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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 185

LESLIE E. BROWN, Individually, and as Next Friend for Norman Brown, a Minor,

Petitioner,

v.

PANHANDLE & SANTA FE RALIWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO, TEXAS

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INDEX

	Page
I. Statement of the Matter Involved	2
II. Jurisdiction	3-4
III. Questions Presented	4-6
IV. Reasons Relied On For Allowance of the Writ	6-90
Conclusion	90-91
Certificate of Service	92

Page

Adam v. Saenger, Tex., 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, conformed to Civ. App., 119 S. W. 2d 687, certiorari denied Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 3

Adam v. Saenger, Tex., 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, den'g rehearing 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rev. 101 S. W. 2d 1046, cert. gr. 58 S. Ct. 28, 302 U. S. 668, 82 L. Ed. 515, conformed to 119 S. W. 2d 687, cert. den. Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 1511 3

Adam v. Saenger, Tex., 58 S. Ct. 28, 302 U. S. 668, 82 L. Ed. 515, gr'g certiorari 101 S. W. 2d 1046, rev. 58 S. Ct. 454, 303 U. S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 640, 303 U. S. 666, 82 L. Ed. 1123, conformed to 119 S. W. 2d 687, certiorari denied Saenger v. Adam, 59 S. Ct. 832, 307 U. S. 628, 83 L. Ed. 1511 2

Alabama G. S. R. Co. v. Brookshire, 1 A. L. R. 2d 612, at p. 617 23

Banker v. McLaughlin, 208 S. W. 2d 843, 847 86

Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 41 L. Ed. 979, p. 984 44

Christopherson v. Whittlesey, 197 S. W. 2d 384, ref. n. r. e. 59

City of Brownwood v. Anderson, 92 S. W. 2d 325 84

City of Panhandle v. Byrd, 106 S. W. 2d 660 52

Danes v. Pierson, 33 N. E. 976 8

D Bar Ranch v. Maxwell, 170 S. W. 2d 303 59

Elliott-Greer Office Supply Company v. Martin, 54 S. W. 2d 1068 4, 8

Page

Feiner v. People of State of N. Y., N. Y. 1951, 71 S. Ct. 303, 340 U. S. 315, 95 L. Ed. 267 24

Fleenor v. Hammonds, 116 Fed. 2d 982, 132 A. L. R. 1241 22

Ford v. Carpenter, 216 S. W. 2d 558 48, 58

Freeman v. Hillman, 173 S. W. 2d 657 10

Gerneth, et al v. Galbraith Fox-Worth Lumber Co., Tex. Com., 38 S. W. 2d 775 9, 15

Gold v. U. S. of Amer. (352 U. S. , 1 L. Ed. 2d 360, 77 S. Ct. , decided January 28, 1957) 40

Haney v. Texas & N. O. R. Co., 119 S. W. 2d 714, err. dis. 78, 79

James-Dickinson Farm Mortgage Co. v. Harry, Ill. 1926, 47 S. Ct. 308, 273 U. S. 119, 71 L. Ed. 569 63

Ladner v. Siegel, 298 Pa. 487, 68 A. L. R. 1172 43

Loretta Massa v. Louis Nastri, et al., 125 Conn. 144, 120 A. L. R. 839 42

Lubbock Bus Company v. Pierson, 277 S. W. 2d 186 7

McCoy v. Texas Power & Light Co., 239 S. W. 1105 86

Meinecke v. Fidelity Investment Co., 62 S. W. 2d 623, Tex. Civ. App., Error Ref. 10

Merritt v. Phoenix Refining Co., 103 S. W. 2d 415, p. 417 80

Michigan-Wisconsin Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U. S. 931, 98 L. Ed. 1083 2

Michigan-Wisconsin Pipe Line Co. v. Calvert, U. S. Tex. 74 S. Ct. 396, 347 U. S. 157, 98 L. Ed. 583, rehearing denied 2

Neimitko v. State of Md., Md. 1951, 71 S. Ct. 325, 340 U. S. 268, 95 L. Ed. 280 24

	Page
Northern Texas Traction Co. v. Thetford, et al., 44 S. W. 2d 902	89
Panhandle Eastern Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U. S. 931, 98 L. Ed. 1083	2
Raphael Konigsberg v State Bar of Cal., Vol. 1, L. Ed. 2d No. 12, p. 18, U. S. S. C. R.	90
Restatement of the Law of Torts, Sec. 283E	87
Remmer v. U. S. of Amer., 350 U. S. 377, 100 L. Ed. 435, 76 S. Ct. 425 (March 5, 1956)	40
Reynolds v. Sindell, 142 S. W. 2d 527	10
Ross v. Tex. Employers' Ins. Assn., 267 S. W. 2d 541	8, 9, 14, 19
Rule 285, R. C. P. of Texas	26
Sexton v. Barry, 233 2d 220	23
Sinclair-Prairie Oil Co. v. Beadle, 89 S. W. 2d 426	53
Southwestern Gas & Electric Co. v. Lain, 139 F. 2d 142	78
St. Louis S. W. Ry. Co. v. Abernathy, 68 S. W. 2d 539	84
Texas Employers' Insurance Assn. v. Wade, 197 S. W. 2d 203	27, 36
Texas-Louisiana Power Co. v. Webster, 59 S. W. 2d 302	78
Texas & N. O. R. R. Co. v. Hays, Vol. 25, Issue 40 of the Texas Supreme Court Reporter, p. 479	50
Texas & Pacific Ry. Co. v. Bigham, 38 S. W. 162	78
Texas Utilities Co. v. West, 59 S. W. 2d 459	55
Union Stockyards v. Peeler, 37 S. W. 2d 126	78
U. S. C. A., Title 28, Sec. 1257, subsection 2	3

	Page
Walker v. Houston Electric Co., 155 S. W. 2d 973 (writ refused), at p. 975	48
Weidenhaupt v. Hoelzel, 35 N. W. 2d 207	19
Wheeler v. Wallace, 167 S. W. 2d 1043	59
White v. Haynes, Tex. Civ. App., 60 S. W. 2d 275, err. dis.	11
Young v. Ragen, Ill. 1949, 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333	24
28 U. S. C. A., Section 1257	4
30b, Tex. Jur., Sec. 91	78
39 Am. Jur., p. 65, Sec. 45	27

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PANHANDLE & SANTA FE RALIWAY COMPANY,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO, TEXAS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Leslie E. Brown, Individually, and as next friend for Norman Brown, a Minor, Petitioner, here prays that a writ of certiorari be issued to review the final decree of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas affirming the judgment of the District Court of Lubbock County, Texas, for respondent.

I

STATEMENT OF THE MATTER INVOLVED

1. The Court of Civil Appeals for the Seventh Supreme District of Texas at Amarillo, Texas, affirmed the judgment of the District Court of Lubbock County, Texas, for respondent. The opinion of the Court of Civil Appeals is reported in *294 S. W. 2d 223*. The Supreme Court of Texas reviewed an application for writ of error N. R. E. on January 9, 1957. (Certified copy of order appears in the record.) A motion for rehearing of application was overruled March 13, 1957. (Certified copy of order appears in record.) The Court of Civil Appeals is thus the highest court of a state in which a decision can be had, within the meaning of *28 U. S. C. A., Section 1257*, as construed by the Honorable Supreme Court of the United States in:

Michigan-Wisconsin Pipe Line Co. v. Calvert, U. S. Tex. 74 S. Ct. 396, 347 U. S. 157, 98 L. Ed. 583, rehearing denied;

Panhandle Eastern Pipe Line Co. v. Calvert, 74 S. Ct. 528, 374 U. S. 931, 98 L. Ed. 1083;

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2. Petitioner brings this suit for Norman Brown whose body was horribly mutilated necessitating some amputations as a result of the negligence of respondents. A jury awarded a verdict for $150,000.00, but the trial court refused the motion of Petitioner for judgment, as well as Petitioner's motion for judgment non obstente veredicto, and entered judgment for respondent and Petitioner take nothing.

II

JURISDICTION

1. Jurisdiction to grant this Petition is sustained by *Title 28, U. S. C. A., Section 1257, subsection 2.* As shown heretofore, the Court of Civil Appeals is the highest court

of a state in which a decision could be had within the meaning of *28 U. S. C. A., Section 1257*. The application for writ of error to the Supreme Court was refused, no reversible error, January 9, 1957, and motion for rehearing of said application overruled March 13, 1957. Certified copies of both orders are included in the transcript which accompanies this application.

III

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the holding of the Amarillo Court in holding that the petitioner was tried before a fair and impartial tribunal when the undisputed facts show that shortly after the trial of the case commenced, it was discovered by the private conversation between the trial judge and a juror that the juror was personally acquainted with one of the employees of the railroad whose acts and conduct were to be called to the attention and passed upon by the jury in the cause being tried in determining the liability of the railroad, and the trial judge was so advised in the absence of counsel in the corridors of the court house after the trial had commenced, and where it further appeared that this fact had not only been concealed but moreover had been denied by the juror during a searching voir dire examination. It becomes a question for this Court whether or not petitioner has been denied due process of law as provided by the Fourteenth Amendment to the Constitution of the United States.

2. Whether the action of the Amarillo Court in affirming the judgment of the District Court of Lubbock County, Texas, refusing to enter judgment in favor of petitioner upon issues that entitled petitioner to same, is so arbitrary and capricious and in such clear conflict with the fundamental principles that have been established in our system of jurisprudence for the protection and enforcement of private rights as to constitute a denial of due process of law as required by the Fourteenth Amendment to the Constitution of the United States.

3. Whether the action of the Amarillo Court in affirming the judgment of the District Court of Lubbock County, Texas, in entering a judgment for respondent based upon petitioner's alleged contributory negligence when the answers of the jury to the special issues are clearly in conflict so as to constitute such an unwarranted, abritrary and capricious exercise of power as to constitute a denial to petitioner of due process of law under the Constitution of the United States.

4. Whether the action of the Amarillo Court in affirming the judgment of the District Court of Lubbock County, Texas, refusing Petitioner's Motion for Judgment Non Obstante Veredicto constituted such an arbitrary and capricious exercise of judicial power, and is in such conflict with the fundamental laws of the land as to constitute a denial of due process of law as required by the Fourteenth Amendment to the Constitution of the United States.

5. Whether the action of the Amarillo Court of Civil Appeals and the Supreme Court of Texas, in refusing to discuss and pass upon the conflict between the special findings of the jury as shown in their verdict constitutes a denial of due process of law to petitioners.

6. Whether the refusal of the Amarillo Court of Civil Appeals and the Supreme Court of Texas to discuss and pass upon Petitioner's contention that the findings of the jury amount to findings of discovered peril amount to a denial of due process of law to petitioner.

IV

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The failure of the Trial Court to declare a mistrial when it was learned that one of the jurors had failed to make a full disclosure of his acquaintance with the railroad employee, Stewart. Stewart, the Court will recall, was a field man, such as Herbert Wolverton, about whom issues of discovered peril were submitted. He also worked under defendant's switching foreman, C. T. Washington. Anyone having a relationship with a juror, under such circumstances, particularly that of a boyhood friendship and of finishing high school together, such as was the relationship between these two gentlemen, would, of course, be stricken by any lawyer who had knowledge of the facts, by the exercise of a preemptory challenge. The juror, Price, either falsely concealed this fact of relationship on voir dire examination, or else he innocently did not know that

Stewart was one of his boyhood friends. This information was discovered after the jury was selected by the trial court in the absence of counsel, somewhere in the corridors of the Courthouse and such a communication as occurred between the said juror and the trial judge was made at a time when petitioner's counsel could not exercise his preemptory challenge and the effect of such communication was that the trial court conducted a voir dire examination of the juror while the juror was not under oath and in the absence of counsel. Under such circumstances, the statement of the Supreme Court of New Hampshire, *120 Atl. 2d 804*, is peculiarly in point:

> "Whether the opportunity afforded to a party to exercise the preemptory challenges granted by statute has been such as to produce a fair and impartial jury must depend upon the facts in existence when the jury was being organized, whether then known to the parties or discovered later. Facts or circumstances first arising after the impanelling of the jury cannot affect the composition of the jury because they did not exist for consideration in the challenging of prospective jurors at the only time when that right might have been exercised."

Even the Amarillo Court recognized, in *Lubbock Bus Company v. Pierson, 277 S. W. 2d 186*, the following rule:

> "It has been held that the members of a jury panel must know something of the nature of the case and the contentions of the respective parties before they could intelligently answer any questions essential to the fitness as jurors. Ft. Worth & D. C. R. Ry. Co. v. Kiel, 195 S. W. 2d 405. The Court there further held that a broad latitude should be allowed counsel on voir dire examination of a jury in order that preemptory challenges may be intelligently exercised."

The sanctity of the jury and its freedom from outside influence are jealously guarded by the Courts and also in practically all jurisdictions by legislative enactments or rules of procedure. In many civil cases question has arisen as to the prejudicial effect of, or at least the possibility of reversible error in, communications between the trial judge or other court officials or attendants and the jurors. While all such communications are subject to close scrutiny, there is a tendency in Texas, as well as elsewhere, to consider that communications between the judge and the jurors are more apt to be prejudicial than are communications between other court officials or attendants and the jurors, this because of the fact that the jurors look to the Court as their authority and guide in their deliberations. *Danes v. Pierson, 83 N. E. 976.*

An impartial jury, selected and kept free from all outside or improper influences, has always been regarded as necessary to a fair and impartial trial.

The Texas Courts in *Elliott-Greer Office Supply Company v. Martin, 54 S. W. 2d 1068*, said that there is a marked difference between the misconduct of a trial judge and misconduct of a jury, and that it is error per se for the judge to communicate or permit a communication with the jury in violation of the statute, and the law in such case does not speculate on whether or not there was an injury but that this was not so in the case of ordinary misconduct. This was the unquestioned law in Texas until the decision of this Honorable Court in *Ross v. Texas Employers' Insurance Assn., 267 S. W. 2d 541.* We do not

believe that this Honorable Court intended to depart from the long line of judicial decisions in Texas by holding harmless the error of the communication in the *Ross* case. This Court distinguished the *Ross* case from the cases hereinafter cited in the following language:

> "A trial judge was confronted with an unusual situation. Delay might have resulted in jury misconduct and it might very well be that the Judge's prompt action actually prevented misconduct by the jury. We can conceive of no other course of action by the Judge which would have been preferable to that adopted by him. *But we need not pass on the question of whether that practice is approved in all cases*, for, assuming that the communication violated the spirit or even the provisions of the rules, it does not follow that the trial court's judgment should have been reversed and a new trial ordered on that account, regardless of whether injury resulted therefrom."

We do not believe that the *Ross* case has the effect of overruling error in cases or cases occurring under the circumstances at bar in which we are able to show harm and prejudice resulting to petitioner. We would like to briefly review a few of the cases before discussing further the question of harm to petitioner in this instance. In *Gerneth, et al. v. Galbraith Fox-Worth Lumber Co., Tex. Com., 38 S. W. 2d 775*, reversible error was shown where the trial judge entered the jury room and remained there two or three minutes, the door being partly closed, during which time some sort of conference was held between the judge and the jury, the nature of which was not revealed.

Reynolds v. Sindell, 142 S. W. 2d 527, was reversed in a case where the judge went to the jury room upon being informed that the jury desired to communicate with him for further instructions; the opinion does not indicate whether further instructions were given.

Freeman v. Hillman, 173 S. W. 2d 657, is another case holding reversible error was committed wherein the judge was closeted behind closed doors with the jury for two or three minutes without the knowledge or consent of the attorneys.

In *Meinecke v. Fidelity Investment Co., 62 S. W. 2d 623, Tex. Civ. App., Error Ref.*, a case was reversed where, in response to a message from the foreman of a jury inquiring about two matters of law involved in the charge, the judge sent back a written message that the jury should answer the issues in accordance with the charges already given, and the Court, holding that this manner of communication was erroneous, stated:

> "A dispute exists as to whether appellant's attorney was in the Courtroom, it being appellee's contention that he was. We think the case presents reversible error more strongly by such assumption, provided counsel did not waive his rights. Such a communication is not of itself vicious. It can be done by agreement. The error can be waived. If counsel abandoned the watchful care of his case, leave the courthouse, and some routine communication with the jury is necessary and counsel has absented himself so that he cannot be consulted as to the necessity of disturbing the jury's deliberations to bring them to the jury box, sometimes from a different floor or building, the blind obedience to such a ritual might well be questioned. But certainly

if he is present at the bar the judge must allow him his statutory right to see and except to instructions or the refusal thereof."

This rule that a communication between the trial judge and the jury outside of open court is erroneous was also recognized in *White v. Haynes, Tex. Civ. App., 60 S. W. 2d 275, Err. Dismissed.*

A study of our Application for Writ of Error and of our Motion for Rehearing convinces us that the lower Court apparently does not realize exactly what the trial court did in connection with this matter. On page 72 of the Statement of Facts, it is shown that the Court made the following statement, and that in response thereto, the following transpired:

"THE COURT: This morning before court convened, one of the jurors in Cause No. 22,120, Brown against Panhandle & Santa Fe Railway Company, now on trial, approached me in the hall and stated in substance that since he had been selected as a juror in this case that he had discovered that he was acquainted with one of the defendant's witnesses. The Court asked him what witness it was and he said 'Stewart,' giving the first name which I don't remember at this time. He stated that on voir dire examination that the lawyers did not inquire by name as to whether he knew the witness or not and that he did not know at that time that Mr. Stewart was going to be a witness, and that the fact that he was a witness in the case wouldn't have any effect on him one way or the other.

"MR. COBB: Would you also state, Judge, that the evidence has been taken in the case already, and that at least two witnesses have testified on behalf of the plaintiff?

"THE COURT: Yes, sir.

"MR. WATTS: I think the bill, in order to reflect the truth, ought to show that one witness has testified, Herman King, and that Allen Wearing testified to a few questions and answers and that I have read from the deposition of C. T. Washington down to Page 26. That shows the exact amount of testimony that's been put on in the case. Now, Your Honor,—

"MR. COBB: That John Watts has been sworn and testified—

"MR. WATTS: Oh, yeah, I testified.

"MR. COBB: —as Attorney for the Plaintiffs.

"MR. WATTS: I testified a little bit as to some photographs I had made. Now, Your Honor, I'm in this position, to begin with I appreciate the fairness and the learned manner in which the Trial Court has thus far presided over this case and I certainly appreciate your calling that to the attention of both sides at this time. I don't—we have been advised by Mr. Cobb that he would object to trying the case with eleven jurors. I have suggested to the Court that I think that we should try it with eleven jurors. The Court then suggested that he question the juror and find out the extent of his acquaintance and whether he discussed the facts of this case with him and determine if he'd pay more attention to what the witness, Stewart, due to their personal acquaintance with him, would say about this law suit than he would to that of some witness that he didn't know, and the defendant's attorney, Mr. Cobb, has made it known that he would object to that procedure upon the grounds that he thinks that it would be calculated to be prejudicial to the defendant and to cause him to go against the defendant railroad. With that objection, I am inclined to agree.

"Now, as to what my rights are, I recognize that you can't try a case with eleven jurors except by consent. Now, I want to except to the juror's failing to divulge to me that he knew a railroad man living in

Slaton since that question some one hour and a half was spent by me in examining the jury and that question as to whether any of them knew anything about the facts of the accident and as to whether any of them had any relatives working for the railroad, as to whether any of them had had railroad experience, as to whether any of them knew any of the employees of the railroad that might be involved in this case, or working at Slaton, was all asked of all of the jurors, generally, and some of them specifically and, in addition to that, that upon voir dire examination the plaintiff's counsel asked several times. 'Now, is there any other reason that might keep you from being fair and impartial in this case as to whether you know it or not?' I think that we asked questions that should have been designed to have elicited an answer from the juror that would have allowed us to challenge him and, if he had revealed to us that he did know the witness, Stewart, we would have disqualified him for cause because in this case one of the big issues in the case is whether or not the switchmen gave these boys permission to ride the train, *and there's only three switchmen under the undisputed evidence, two of which, under our theory of the case, talked to the boys and those witness' names being Washington, Stewart and Wolverton.*"

We therefore see from reading the above that what the trial Court attempted to do was actually hold Court on a post voir dire examination of the jury. It is so well settled as to require no citation of authorities that the trial Court cannot hold court at any place other than the Courtroom. The rule prohibiting the judge from communicating orally with the jury is not the only thing here involved. Under the common law and under the most elementary legal principles, an examination of a jury such as was made by the Court could not be made legally in

the absence of counsel. This is not a case like the *Ross* case in which this Honorable Court can say, as they did in the *Ross* case, that there was nothing else that the Court could do.

The rule that a defendant charged with a crime in a criminal case has to be at all times present in Court and confronted with the witness against him cannot be any more sacred and is not nearly so important to the party involved who has been injured as is the rule permitting plaintiff's counsel to be furnished with truthful and correct information from jurors and further permitting plaintiff's counsel to examine jurors for the purpose of determining whether or not his client has, in the first instance, secured a fair and impartial jury so as to secure the type of trial that our Constitution guarantees. There is no way that the Court can know whether the juror concealed this fact and after having been selected, either became excited or that his conscience began bothering him and he finally decided to tell the truth. In any event, his questioning by the Court in the Courthouse corridors in the absence of counsel was highly improper and his statements to the Court were not under oath. The Court should have advised the juror, prior to any conversation with him, that he could not discuss anything with him in the absence of counsel. This the trial Court failed to do.

The legislature, or our rule-making bodies, could not pass rules that would make legal such a communication as the Court indulged in in this case. What the Court did in this case is in violation of sacred rights that have

long been jealously protected by our Courts and what the Court here did is far more serious than any oral communication with the jury after they have retired. This is too serious a matter for the Courts to tolerate and this Honorable Court can realize when the matter is thus considered that Rule 285 is not the only law involved, neither in the *Ross* case in point with what happened here.

In the *Gerneth* case, supra, for instance, the Court said:

> "It was not even shown that the communications concerned the case then on trial. It was there held that such conduct constituted reversible error. In disposing of the case, Justice Critz, recognizing the rigidity of the above-cited rules (then statutes), said: 'Obedience to the above statutory provisions is necessary to preserve the right of trial by jury in an open forum. When the trial judge violates these statutes by communicating with the jury at a place not in open court, error is committed, and reversal must follow regardless of the question of injury.'
>
> "In the more recent case of Houston Electric Co. v. Lee, 139 Tex. 166, 162 S. W. 2d 692, it was held that the trial judge's action in sending the baliff into the jury room to procure the jury's work sheet while the jury was deliberating, and the bailiff's informing the judge that the foreman said that the jury would have a verdict in fifteen minutes, constituted reversible error as an improper 'communication between court and jury,' notwithstanding that there was no personal conversation between the judge and jury, and notwithstanding that in ascertaining the state of the jury's deliberations no wrong was intended.
>
> "In the case of the City of Waco v. Craven, Tex. Civ. App., 54 S. W. 2d 883, 885, it was held to be reversible error for the trial court to enter the jury room and discuss with the jury briefly the probability of the

jury reaching a verdict. In such case, in an opinion by Justice Alexander, it was said: 'It is well settled that the trial judge may communicate with the jury with reference to the case only in open court. When the trial judge violates these statutes by so communicating with the jury at a place not in open court, error is committed, and reversal must follow, regardless of the question of injury.'

"In Millerman v. Houston & T. C. R. Co., Tex. Civ. App., 27 S. W. 2d 897, 899, writ refused, the foreman of the jury left the jury room while the jury was deliberating and, after entering the courtroom where the trial judge was, told the judge that the jury was standing ten to two on one question and that two of the jurors wanted to recommend that a bridge or sluiceway be built in the railroad. The trial judge testified that he immediately told the juror not to talk to him about the case and to answer the questions as given in the charge. After the foreman had talked with the trial judge he returned to the jury room and told the other jurors that the court stated that the jury could make no recommendations, but said that they should answer the questions asked. In holding such conduct reversible error, the Waco Court of Civil Appeals said: 'Clearly, we do not think the trial court intended to do any wrong. It appears that he was trying to keep the juror from talking to him. *However, almost the identical question involved here has been at different times before the Supreme Court of this state, and it has been universally held that any communication by an individual member of the jury with the court relative to the cause on trial, especially after the same has been submitted to the jury, will necessitate a reversal.* * * * The statutes above referred to provide specifically that the jury shall not have any communication with the trial judge after it retires to consider the verdict, except when the entire jury appears in open court, or when the jury communicates with the court in writing. It is unfortunate that a verdict must

be set aside by reason of the foreman of the jury having talked to the court, innocently though it was done as in this case, and the judge having discussed the matter with the juror, innocently as was done. However, our courts have uniformly held, and we think it the only safe rule, that where the Legislature has definitely and clearly enacted a statute, the courts should observe and enforce same.'

"'It is our further opinion that it is immaterial that the violation of the rules complained of in the instant case occurred in the courtroom. For expediency such room had, for the moment, been transformed into a jury room. Everyone concerned recognized it as such and officers were stationed to guard its privacy. The trial judge had no cause to assume that the jury had reached a verdict and was ready to report. He knew they merely wanted to ask him a question. The Sheriff had gone to summon the attorneys in the case, but neither they nor the sheriff had arrived. The trial judge knowing that, did not wait for their arrival, nor did he have the officer in charge place the jury in the jury box or open the courtroom door or do any act to indicate a cessation of jury deliberations and a resumption of open court. On the contrary, the trial judge entered the jury room while the jury was still deliberating and permitted them to ask him a question behind closed doors and under circumstances, which could not reasonably be presumed to be in open court. We think such conduct, however innocent it may have been, was clearly a violation of the provisions of the rules in question and, under the authorities above cited, necessitates a reversal of this case."

We would like to call the Court's attention to the fact that in none of the cases cited has there been anything approaching the harm that was done to the petitioner in the cause at bar. Petitioner definitely did not want a friend on the jury, particularly a boyhood friend who

had finished high school with one of the witnesses who was, in effect, a fellow workman and close friend of Washington and Wolverton, who were being accused of negligence in this case. The case is far more serious than the *Waide* case discussed in our original Aplication in which a mere failure to relate something concerning a prior injury was involved. Here we had no opportunity to exercise a peremptory challenge on the jury and here the Court attempted to hold Court in the corridors of the Courthouse in the absence of counsel. The juror could have had no other feeling than that he knew that the petitioner's counsel did not want him sitting on the jury. After the Court did nothing about this, the only feeling that the juror could have had would have been that the Court was against the plaintiff in this cause of action and was helping him in concealing a material fact from petitioner's counsel. It will be noted that the issues submitted as to the negligence of Wolverton, co-employee of Stewart, were answered against petitioner. There is nothing in the record that the friendship that the juror, Price, had for the witness, Stewart, had anything to do with this, but certainly, it is evidence of prejudice to the plaintiff in this cause in allowing a friend of such a witness to serve as a juror in this case. Petitioner's counsel recognizes that the trial Court did not intend to do anything wrong. But the law in this connection is so important to the Constitutional guarantee of trial by a fair and impartial jury that a mis-

trial should have been declared. As said by the Court in *Wiedenhaupt v. Hoelzel, 35 N. W. 2d 207:*

> "The rule is strict and any deviation from the rule has generally been treated as sufficient ground for setting aside the verdict, even though, as here, the communication was not prompted by improper motives and even though it is not influencing the jury in arriving at their verdict. A defeated party should not be required to show that a communication not made in open court was in fact prejudicial."

In the *Ross* case it will be recalled that the communication there was made in open Court and hence, was not violation of our Constitutional guarantees and of the common law saying that the trial Court is not to attempt to hold Court anywhere except in the Courtroom while in open court. As bearing on this question, it was held:

> "However, in Lloyd v. St. Louis Public Service Co. (1950), 360 Mo. 91, 227 S. W. 2d 460, where the jury's request conveyed to the trial judge by their custodian to be allowed to hear again the evidence of a certain witness was answered orally through such custodian, who returned to the jury room with the information that the evidence of the witness would not be read, the court, which stated that granting a new trial for misconduct or indiscretion on the part of jurors, lawyers, and the trial judge, occurring prior to the rendition of a verdict, rests largely within the discretion of a trial court, and that unless abused, the exercise of such discretion will not be disturbed, held that there was ample ground in this case to sustain the order of the trial judge granting a new trial, the mere fact that the judge communicated with the jury by messenger on a matter pertaining to the evidence, even though the messenger was the deputy sheriff in charge of the jury, being sufficient to sustain the court's

order. The foregoing case was cited in Wiles v. Stowe (1951, Mo. App.), 236 S. W. 2d 2, supra, Sec. 11, as authority for the statement that reversible error is presumed from a visit by the trial judge to the jury room, no matter if such visit was without prejudice to the complaining party.

"And in Neely v. Wooley (1940), Tex. Civ. App., 143 S. W. 2d 1015, the act of the trial judge was held reversible error, whether or not it resulted in injury to the losing party, where, the jury having requested that testimony be read to them, the judge sent them a note to the effect that the jurors should designate the names of the witnesses whose testimony they wished to read, and also made a statement to the same effect to one of the jurors, outside the jury room, and out of the presence of the other jurors.

"Again in Hartgrove v. Chicago, B. & Q. R. Co. (1949), 358 Mo. 971, 218 S. W. 2d 557, an action under the Federal Employers' Liability Act, where the foreman of the jury, while in conference with the judge in the latter's chambers, asked if the jury had power to award less than the amount sued for, to which the judge replied that they should read the instructions already given in the case and the forms of verdict, the court, reversing the judgment, said: 'The trial judge * * * stated the foreman's question was of little importance as bearing on the merits of the case. But the memorandum discloses the trial judge did discuss the case with the foreman in chambers and in the absence of the other jurors and of counsel. The merits of the case, of course, included the issues of liability and the amount of the award, and it could not be said that the amount of an award might not be 'compromised' or lowered in order to induce the concurrence of one or more jurors in a 'finding * * * for the plaintiff' upon the issue of liability. And how did the trial judge know and how can we know, assuming the trial judge was correct in his conclusions stated, that the foreman cor-

rectly quoted to his fellows what the trial judge had said. We are unable to determine the impropriety of the trial judge's action was not prejudicial.

"As said in Rorinson v. Woodard, 151 N. Y. S. 655, in which, although the only conversation between the jury and the justice of the peace, who, on request, went to the door of the jury room, was a question by the jurors as to the form to be used if they desired to bring in a verdict for the defendant, and the response by the justice that 'I know of no other way to bring in a verdict, except either for the defendant or for the plaintiff,' the judgment was reversed, the court saying: "So far as disclosed it is impossible to conceive that any possible harm could have been done by this innocent compliance by the justice with the request of the jury. Nevertheless, it has long been settled that no communication with a jury in the absence of the parties or their attorneys, or except with their express consent, can be had by the judge or justice presiding at the trial, and the reasons for this are obvious, especially in courts of justices of the peace. The difficulty in ascertaining exactly what did take place and the opportunities for fraud are more than sufficient to require that this rule be strictly enforced and also to preclude an appellate jurisdiction from attempting to decide whether or not such error was harmless."

It is quite evident that this Honorable Court has jurisdiction to grant this petition under the rulings of the Court as hereafter set forth:

"In exercise of power over procedure and to satisfy a public need, state may choose remedy best adapted in legislative judgment to protect interest concerned provided its choice is not unreasonable or arbitrary and procedure satisfies constitutional requirement of reasonable notice and opportunity to be heard. The Hardware Dealers' Mut. Fire Ins. Co. of Wisconsin

v. Glidden Co., 1931, 52 S. Ct. 69, 284 U. S. 151, 76 L. Ed. 214, affirming 233 N. W. 310, 181 Minn. 518.

"A state is free to regulate court procedure in accordance with its own conception of policy and fairness without infringement of this amendment unless some fundamental principle of justice is violated. Snyder v. Commonwealth of Massachusetts, 1934, 54 S. Ct. 330, 291 U. S. 97, L. Ed. 674, affirming 185 N. E. 376, 282 Mass, 401. * * *.

"The 'due process of law' guaranteed by this amendment requires a trial in a state court conforming to the fundamental conceptions of justice, which lie at the base of civil and political institutions and if the state supplies no protective process, the federal courts will intervene to protect the life or liberty of a citizen from a judgment where the trial is not conducted according to such standards. State ex rel. White v. Hilgemann, 1941, 33 N. E. 2d 129, 218 Ind. 572."

In *Fleenor v. Hammond, 116 Fed. 2d 982, 132 A. L. R. 1241*, it is stated as follows:

"The Fourteenth Amendment provides, inter alia, 'nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.' This governs any action of a state 'whether through its legislature, through its courts or through its executive or administrative officers.' Mooney v. Holohan, 294 U. S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406; Carter v. Texas, 177 U. S. 442, 447, 20 S. Ct. 687, 44 L. Ed. 839; Rogers v. Alabama, 192 U. S. 226, 231, 24 S. Ct. 257, 48 L. Ed. 417; Chicago, Burlington & Quincy R. v. Chicago, 166 U. S. 226, 233, 234, 17 S. Ct. 581, 41 L. Ed. 979. The most recent application of this principle is made in Smith v. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. (Adv. 106), November 25, 1940. While the phrase 'due process of law' has never been precisely defined and per-

haps is incapable of such definition; the concept is within limits capable of being fully grasped by the judicial and professional mind. It has frequently been construed as synonymous with the phrase 'according to the law of the land.' Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158, 84 A. L. R. 527, notes the general acceptance of Webster's classic commentary upon it as 'a law which hears before it condemns.' More recently it was said, Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 465, 80 L. Ed. 682, that the due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

From *Alabama G. S. R. Co. v. Brookshire, 1 A. L. R. 2d 612 (at page 617)*, we quote as follows:

"From the era of the lighted squib to that of the incandescent lamp, common-law jurists have been constant in reasoning that, in the absence of statute, liability can be lawfully based only upon an act or omission, which directly and proximately causes an injury. But legislative enactments may not be prescribed by common law; and 'the construction given by the courts of the several states to the legislative acts of those states, is received as true, *unless they come in conflict with the constitution, laws or treaties of the United States.*' Elmendorf v. Taylor, 10 Wheat. 152, 160, 23 U. S. 152, 160, 6 L. Ed. 289 (Chief Justice Marshall)."

In *Sexton v. Barry, 233 Fed. 2d 220*, it is stated as follows:

"Due process is so secured by laws operating on all alike, *and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right*

and distributive justice. Caldwell v. Texas, 137 U. S. 692, 11 S. Ct. 224, 34 L. Ed. 816; Duncan v. Missouri, 152 U. S. 377, 14 S. Ct. 570, 38 L. Ed. 485. *Due process is 'a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial.' Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629."*

In review of state decisions where rights under U. S. C. A. Amend. 1 are drawn in question, Supreme Court will make an examination of the evidence to ascertain independently whether the right has been violated. *Feiner v. People of State of N. Y., N. Y. 1951, 71 S. Ct. 303, 340 U. S. 315, 95 L. Ed. 267.*

A state may choose the procedure it deems appropriate for the vindication of federal rights, but where state court of last resort closes the door to any consideration of a claim of denial of a federal right, it is not simply a question of state procedure. *Young v. Ragen, Ill. 1949, 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333.*

In cases in state courts in which there is a claim of denial of rights under U. S. C. A. Const., Supreme Court is not bound by conclusions of lower court, but will re-examine the evidentiary basis on which those conclusions are founded. *Neimitko v. State of Md., Md. 1951, 71 S. Ct. 325, 340 U. S. 268, 95 L. Ed. 280.*

The due process clause was sufficiently invoked before the lower courts. In Petitioner's brief before the Honor-

able Amarillo Court, the due process clause was invoked on the following argument from which we quote verbatim:

In addition to this, this statement was made, not only in the absence of counsel for defendant, but in the absence of all counsel. The Court was advised by one of the jurors that he was personally acquainted with a witness and that he, in effect, *realized that from the voir dire examination that he was disqualified as a matter of law from sitting as a juror by virtue of his acquaintance with the witness*, Stewart, and yet the Court, at a time when practically no evidence had been introduced, did nothing about it. The only effect that this would have *would be to lead the jurors to believe that the Court was so biased in favor of the railroad that he was willing to permit a man who was disqualified under the law to sit upon the jury without the knowledge of counsel for the appellant*. No other construction could have been given to the conduct of the Court by the jurors. The Juror in the *Ross* case must have clearly realized that the Court simply did not want him to make any statements to the jury that was not in evidence about his personal experiences about his past and hence, he could well believe that the Court was not wanting him to present something that might be prejudicial to the defendant on account of an injury that he had suffered. However, the oral communication in this case is far more material and this point does not rest upon the oral communication alone, but upon the failure of the juror to disclose evidence that would have enabled us to pick twelve fair and impartial jurors and to have exercised our peremptory challenges from the start. We respectfully urge

that this omission, under cases cited in our original brief should reverse and remand this case wherein there is a clear showing of harm, not only from the communication, but from the failure of the juror to give to us on voir dire the information to which we were entitled and which upon receiving we were unable to cross-examine the juror to find the extent of the acquaintance or anything else but had to rely for this upon the testimony of the railroad witnesses as to the extent of that relationship. This Honorable Court will take due notice that with such knowledge we certainly would have exercised our peremptory challenges.

We not only told the Court that his relationship with the juror would be highly prejudicial to the plaintiff but our last act was to ask the Court to declare a mistrial and this Honorable Court should grant this application and in the event that Judgment is not rendered for petitioner reverse and remand on this point. We feel that this constituted a proper objection in that it might be prejudicial to the defendant and particularly since such communication is in violation of Rule 285, R. C. P. of Texas and in Paragraph 10, Pg. 133 of the Transcript, in Appellant's Motion for New Trial, complaint was made of this action of the Trial Court.

Rule 285, R. C. P. of Texas, provides as follows:

> "The jury may communicate with the Court by making their wish known to the Officer in charge, who shall inform the Court, and they may then, in open court, and through their Foreman, communicate with the Court, either verbally or in writing."

Rule 286 provides for the procedure after the jury has retired.

It is quite plain that this communication between the juror and the Judge in the absence of all counsel and then later, the examination of the juror in the presence of counsel was calculated to harm the plaintiff in that it is quite apparent that the juror, Price, knowing one of the key witnesses for the railroad, would necessarily feel that complaint as to him would be made by the plaintiff. In addition to this, even though the juror said that he was not interrogated as to whether he knew any of the key witnesses, still he did undergo such an interrogation on voir dire examination by plaintiff's counsel that made him realize that he did fail to answer the questions completely and truthfully and this is the only reason that this Court can assign to the juror's action in seeking the Trial Judge and making known to him the fact that he knew one of the witnesses for the railroad since it had to be something that the juror found or discovered on voir dire examination that made him realize that he was possibly disqualified as a juror in this cause.

The Court should have sustained the Motion for Mistrial under the Texas law as decided in the Texas case of *Texas Employers' Insurance Assn. v. Wade, 197 S. W. 2d 203*, in which case the Court said:

> "Rule 226, Rules of Civil Procedure, provides that before the parties or their attorneys begin the examination of the jurors whose names have thus been listed, the jurors shall take an oath that they will true answers given to all questions propounded to them concerning their qualifications as a juror."

In *39 American Jurisprudence, page 65, Section 45*, it is stated:

"It seems generally agreed that when matters which might establish prejudice or work a disqualification of a juror are actually gone into upon the voir dire examination and false answers are given or deception is otherwise practiced, as the result of which a juror, although disqualified in fact, is accepted, the party misled or deceived, thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though, it has been held, the bias or prejudice is not shown to have caused an unjust verdict; it is sufficient that a party, through no fault of his own, has been deprived of his constitutional statutory guaranty of a trial of his case before a fair and impartial jury. The fact that objection was not made to the juror or an exception saved is not controlling. Apparently no distinction is to be made between merely statutory disqualifications and those which affect the impartiality of the juror. Some courts indeed have declared that the constitutional right to an impartial jury would be infringed if a new trial were not granted where a juror testified falsely as to his impartiality, and the trial court may, on its own motion, during the trial term, grant a new trial upon this ground.

"The failure of a juror in a damage suit, when interrogated on this point on voir dire, to disclose the fact that he or some member of his family was, or has been involved in another action for damages, or that a judgment for damages had been rendered against him or some member of his family in another action, will furnish grounds for setting aside the verdict and granting a new trial, when the falsity of his answers are discovered after trial.

"In 31 American Jurisprudence, page 638, Section 108, it is stated: 'Duty and Conduct of Juror.'—Full

knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either for cause or peremptorily, and it is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter. If he falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, he is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. Such concealment or misstatement is punishable as contempt if its tendency and design are to obstruct the processes of justice, and the privilege from disclosure of the deliberations of a jury does not apply in the case of a juror who has procured his acceptance or retention as such by misrepresentation, even though it may also constitute the crime of perjury.

"In the case of Gossett v. Jones, Tex. Civ. App., 123 S. W. 2d 724, 726, this court had under consideration a case in which a juror, when questioned on voir dire examination, failed to disclose the fact that he was related to the appellee within a prohibited degree under Article 2134 of the Revised Civil Statutes of Texas. These facts were set up fully in an affidavit attached to appellant's motion for a new trial. This court, in reversing and remanding the cause for a new trial, held: 'The record fails to disclose that appellants' counsel were negligent in failing to discover these facts, or that they failed to disclose them to the court immediately on making the discovery. Under the above facts, appellants' motion presented good grounds for a new trial. 26 Texas Jur., page 740, Sec. 173; Stringfellow v. State, 42 Tex. Cr. R. 588, 61 S. W. 719; Texas Pacific Railway Co. v. Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410.'

"In the early case of Texas & Pacific Railway Co. v. Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410, 411, one of the jurors failed to reveal that he was related

within the third degree to appellant's wife, who was not a party to the suit but who would have benefited by a recovery by the plaintiff. In holding that the proposition presented reversible error, the court said: 'The attorney for defendant believed that by remaining silent the juror intended to answer that he was not related to either party. The fact of relationship between the juror and plaintiff's wife is made to appear by affidavit attached to the motion for a new trial, and, further, that these facts first came to the knowledge of the defendant's attorney after the trial. It clearly appears that defendant's attorney was not guilty of any negligence in failing to discover these facts. The motion presented good grounds for a new trial, and the court erred in refusing to grant the same. McGehee v. Shafer, 9 Tex. 20, 24; Hanks v. State, 21 Tex. 526.'

"In the case of Gulf, C. & S. F. Ry. Co. v. Dickens, 54 Tex. Civ. App. 637, 118 S. W. 612, 615 (no writ applied for), error was assigned based upon the fact that one of the jurors who tried the case had a preconceived idea as to the rights of the party and was thus biased, and that on voir dire examination he had testified that he was not biased or prejudiced and had no oponion as to the merits of the case. The court, in holding that the trial court was in error, in its opinion said: '* * * A fair and impartial trial by a fair and impartial jury is what the law exacts, and this requirement becomes a delusion if men with bias or prejudiced or preconceived ideas of the rights of one are allowed to sit in judgment on his case. Hughes v. State, Tex. Cr. App., 60 S. W. 562, 565. The facts show that counsel for the appellants were misled into the belief that the juror was fair and impartial, and they did all that could be done to obtain from him the facts, and only learned the truth after the trial. We feel sure that the learned trial judge would have allowed the challenge to the juror if he had told upon his examination the facts that were developed on the mo-

tion for new trial. Consequently we are of opinion that these assignments present reversible error, for which the judgment must be reversed.'

"While the Texas courts have not spoken precisely upon the facts here involved, except by way of analogy, insofar as we have been able to ascertain, there are cases from other jurisdictions which are in point upon the factual situation here existing, which we think set forth the only proper and safe rule that can be followed.

"In the case of Pearcy v. Michigan Mutual Life Ins. Co., 111 Ind. 59, 12 N. E. 98, 99, 60 Am. Rep. 673, the court in its opinion announced the rule that: 'The examination of a juror on his voir dire has a twofold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right to peremptory challenge given to parties by the law. It is often important that a party should know the relation of a person called as a juror to his adversary, in order that he may interpose a challenge for cause, or exercise his peremptory right to challenge. It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. In this instance, the appellant had a right to a full and truthful answer from Bowman, and it was his duty to make that answer without evasion, equivocation, or concealment.

"Another leading case bearing upon this subject is the case of Shulinsky v. Boston & M. R. R., 83 N. H.

86, 139 A. 189, 191. One of the jurors in that case had had some dealings with the plaintiff, but on voir dire examination, though asked, he remained silent and concealed his business relations with the plaintiff. The trial court refused to grant a new trial and the Supreme Court, in holding that a new trial should have been granted, said:

"'* * * if by reason of false information furnished under the court's authority and in organizing the jury, a peremptory challenge as to a prospective juror is not exercised, the party having the right of challenge is as effectively deprived of the right as though the rights were denied. * * * False information thus obtained and relied on is as destructive of a fairly constituted jury, in its application to a peremptory challenge as to a challenge for cause. * * *.

"'Argument that a finding that the trial was fair is not pertinent. The question is whether a proper tribunal was established, and not whether an improperly established tribunal acted fairly. * * *.

"'If due diligence has been used and there is no waiver of rights, the fact that a juror disnqualified either on principal cause or to the favor has served on a panel is sufficient ground for setting aside the verdict, without affirmatively showing that the fact accounts for the verdict. The trial is unfair because the jury is improperly constituted. * * * Nor is there any force in argument that the information although false was unintentionally so, and that there was therefore no bad faith. The harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant. * * *.

"'* * * The facts here appearing that false information was given as an incident relating to the trial and that it was relied upon without lack of due diligence, the right to a new trial follows as a matter of law.'

> "Under our jury system the parties to a suit may exercise their peremptory challenge in selecting a jury with adequate information concerning the prejudices, bias, point of view, and qualifications of the respective jurors on the panel. To permit a juror to conceal information that would affect the right of the attorneys trying the case in exercising their peremptory challenge would destroy the right of trial by a statutory jury."

We respectfully submit that as it was found that the juror was disqualified by reason of a boyhood acquaintance in which he finished high school with one of the chief witnesses for the railroad that the Court should then and there have granted plaintiff's Motion for Mistrial. Although plaintiff tried to obtain all of the facts he was unable to do so and once these facts were made known plaintiff had the right to ask for a mistrial under the decisions announced in the above case.

This Petition for Writ of Certiorari should be granted. We now quote the record to show this case was raised before the Supreme Court from a brief from a supplemental argument filed in support of Petitioner's motion for rehearing of application for writ of error filed by the Honorable Walter Ely verbatim:

I.

The Importance of the Case.

II.

The Threat to Trial by Impartial Jury Inherent in the Decision of the Court Below.

Looking first at the point immediately above, we see that shortly after the trial of the case commenced it was

discovered through a private conversation between the trial judge and a juror that the juror was personally acquainted with one of the employees of the defendant railroad, the Respondent herein, and that this fact had not only been concealed, but moreover had been denied by the juror during a searching *voir dire* examination during the process of jury selection. In view of the gravity of the dispute involved, this fact of itself would seem to trouble the minds of those charged with the responsibility of guaranteeing impartial justice. The additional and overpowering consideration is that it was not a mere "employee" of Respondent with whom this juror enjoyed personal familiarity, it was an employee whose acts and conduct were to be called into question by Petitioner insofar as such acts and conduct related to the crucial issues which were to determine the merits of the cause.

Upon learning of this palpable irregularity, Petitioner's trial counsel availed himself of every legal precaution at hand. He moved for a mistrial on the very day—within hours—of the revelation of this grievous development. The record reveals that the motion for mistrial was overruled perfunctorily and without even a comment by the trial court as to the thought processes which inspired this ruling.

May we put the issue to your Honors in this simple question: What possible harm could have been done by the granting of this motion and the selection of a new jury in whom BOTH parties might repose confidence to entrust their rights? Two answers, and two answers only, might suggest themselves: (1) Delay; (2) Expense.

No honorable lawyer should quarrel with the proposition that justic should move swiftly and with as little expense to litigants as possible, but could any consideration of the trivial expense and delay which would have been made necessary outweigh the importance of assuring to a mutilated infant not only a just tribunal but, equally important, a tribunal which had the *appearance* of being just.

Your Honors, as experienced trial lawyers, are not naive, and this thought leads us to pose another question. Who stood to lose the most by any delay or expense, however slight, which would have resulted from the granting of Petitioner's motion? Any money to be involved would remain in the Treasury of Respondent. The record reveals that Petitioner, at an expense which may be presumed to be more than nominal, had brought witnesses from California for the purpose of the trial. It is submitted that any hardship which would have been worked by the discharge of the impaneled jury and the selection of an impartial jury would have been worked on the boy plaintiff and to a minimal extent, if at all, on the railroad. Yet it was the boy who asked for the mistrial, and it must be clear to any practical lawyer that such a motion would not have been made unless the clear probability of injustice was present.

Petitioner, being denied the right to make inquiry as to the nature and extent of the relationship existing between the witness and the juror, was proceeding blindly; yet he did not choose to remain silent and speculate upon

a favorable verdict. He did everything that any reasonable rule of law ought to require by taking the step immediately obvious as the one which would solve the problem without prejudice to either party.

A Texas Court, as ably as any in the land, has pointed out that the good or bad faith of the juror is not the issue. This Court stated:

> "Under the weight of authority the mere fact that the juror did not act in bad faith is not the question to be determined in a case of this character. *The question is whether a proper tribunal was established, and not whether an improperly established tribunal acted fairly.*" (Italics ours.)
>
> *Texas Employers' Ins. Assoc. v. Wade*, 197 S. W. 2d 203, error refused.

It is submitted that the Court in the language above quoted found its way to the heart of the problem. All must recognize that there may be those instances in which a tribunal which appears to be fair is not fair, but it is more important from the standpoint of society and the respect in which courts are held by the lay public that a tribunal *appears* to be fair even though it may not be fair.

From the objective viewpoint of a trial lawyer, there would seem to be no doubt whatsoever but that the Petitioner was deprived of a fair trial because of the tragic irregularity disclosed. At the outset of the trial his attorney was confronted with the miserable prospect of advocating a cause to a jury among whose members was a

man friendly with the adversary. No lawyer could exert his best efforts under such circumstances, and a boy in the mutilated condition of Petitioner was entitled to the best efforts of the best lawyer in the world. These are practical considerations which are addressed to your Honors in the light of your practical experience as lawyers. You are the Court of last resort of a Sovereignty which, more than any other, has sought to safeguard and preserve the right of trial by jury. We are in a time when this right is sought to be subverted, even by men in high places.

See

"The Future of the Trial Lawyer," by David W. Peck, Journal of the American Judicature Society, August, 1956.

For this Court, by refusing even to consider the problem, to finalize the judgment *now attacked would bring troubled concern to all free-minded champions of constitutional guarantees.*

The constitutional question was further raised directly and from cases decided by this Honorable Court in an amicus curiae brief filed in support of Petitioner's motion for rehearing of application for writ of error by the Honorable Joe H. Tonahill of Jasper, Texas. We here quote from said brief verbatim:

The writer spends a greater part of his professional practice in the trial of cases before the Court and juries, and having been acquainted with the facts and previous holdings in this matter, especially with reference to Peti-

tioner's Points 5 and 6, it is respectfully submitted that if the manifest harm occasioned by the communications between the juror and the trial court regarding the intimacy of the juror's relationship with the highly material witness Stewart is allowed to stand without a very firm reprimand, then the bench and bar of this state, the jurisprudence of this state, must say to the world that our great Supreme Court of Texas acquiesces in the subjecting of jurors during trial to extraneous influences to which no juror should be subjected, wholly in violation of the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from unauthorized intrusions purposely made.

When the juror in this case made known his intimate background with the highly material witness in the case to the trial court in the corridor, it is inescapable that the Court, permitting that juror to complete the trial of the case, necessarily imposed upon that juror's mind that the Court was sympathetic to the side in behalf of which the juror's friend was giving evidence. The fact that no full hearing was then and there had between the Court, opposing counsel, and that particular communicating juror, and to the fullest extent, certainly had the effect of forcing that juror to conclude that not only was the trial court against the plaintiff, but by remaining quiet and permitting the juror to remain quiet in refraining from bringing the matter out into an open hearing amounted to the trial court in effect, yet impliedly, telling that juror his friend's

side of the case was the right side. The juror's mind was therefore corrupted.

It is a well known axiom in the law that a juror's expressions to third persons about the case on which he is sitting gives rise to a presumption of that juror's prejudice.

Obviously the juror was disturbed when he discovered that his good friend was to give partisan testimony in the case; otherwise he would not have told the trial judge, and when the judge reacted as he did and never brought the juror before the bench in the presence of opposing counsel for the purpose of holding a hearing to determine whether the communication made by the juror to the judge was harmful to your petitioners, and just let it ride, that juror's reaction of necessity to the Court's failure to air the matter out compelled that juror to feel that the trial judge was glad he was on the jury because he was the respondent's witness' friend.

It is vital to the judicial system that a jury shall, in determining a case, be free from external causes which tend to disturb the free and untrammeled exercise of deliberate and unbiased judgment.

The ascertainment by the juror here that a very partisan witness was a close friend of his was so disturbing to that juror that he collared the trial judge in the corridor and reported this matter to him as being very serious to this juror. The manner in which the trial court handled it, so far as that juror was concerned, placed him in such a frame of mind that he could not, or at least did not, exercise the

same calm and informed judgment which he would have exercised except for the Court's passive attitude.

How can it, therefore, be said that Petitioner's right to be tried before a fair and impartial jury within the contemplation of law did not suffer impingement?

It is respectfully submitted that the Petitioner's Motion for a Rehearing of its Application for Writ of Error should be granted because of the manifest error of the trial court in failing to:

(1) Hold a full hearing between the Court, opposing counsel, and the communicating juror for the purpose of determining whether the incident complained of was harmful to petitioner, and if after hearing, it was found to have been harmful, then to grant a mistrial;

(2) In failing to grant a mistrial consistent with the well known axiom that a juror's expressions to third persons about the case on which he is sitting of necessity gives rise to a presumption of that juror's prejudice.

In support of this amicus curiae plea Your Honors' attention are respectfully invited to the case of *Remmer v. United States of America, 350 U. S. 377, 100 L. Ed. 435, 76 S. Ct. 425 (March 5, 1956)*, and *Gold v. United States of America (352 U. S. , 1 L. Ed. 2d 360, 77 S. Ct. (decided January 28, 1957)*.

The following authorities clearly sustain the view that the federal question was sufficiently passed upon and considered by the lower Court:

"No particular form of words is necessary to be used in order that the Federal question may be said to be

involved. Dewey v. Des Moines (1899), 173 U. S. 193, 43 L. Ed. 665, 19 S. Ct. 379; Keokuk & H. Bridge Co. v. Illinois (1900), 175 U. S. 626, 44 L. Ed. 299, 20 S. Ct. 205.

"Other statements of the rule are—that in order to sustain the jurisdiction of the United States Supreme Court upon the ground that a Federal question was presented it should appear either that such question was apparent in the record or that, from the facts stated, such *question must have arisen and been necessarily involved* in the case. New Orleans v. New Orleans Waterworks Co. (1891), 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. 142—that it must appear unmistakably on the face of the record that the *supreme court of the state either knew or ought to have known* that the validity of the statute in question was challenged on account of its repugnancy to the Constitution or laws of the United States. Endowment & Benev. Asso. v. Kansas (1887), 120 U. S. 103, 30 L. Ed. 593, 7 S. Ct. 499—that a definite issue as to the validity of the statute *or the possession of the right must be distinctly deductible from the record*. Powell v. Burnswick County (1893), 150 U. S. 433, 37 L. Ed. 1134, 14 S. Ct. 166; Louisville & N. R. Co. v. Louisville (1897), 166 U. S. 709, 41 L. Ed. 1173, 17 S. Ct. 725.

"Review by the Supreme Court of a judgment of a state court requires that it appear from the record, affirmatively *or by fair implication*, that a decision as to the federal question was necessary to the state court's determination of the cause. Williams v. Kaiser (1945), 323 U. S. 471, 89 L. Ed. 398, 65 S. Ct. 363; Herb v. Pitcairn (1945), 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459; Wilson v. Cook (1946), 327 U. S. 474, 90 L. Ed. 793, 66 S. Ct. 663; Grand River Dam Authority v. Grand-Hydro (1948), 335 U. S. 359, 93 L. Ed. 64, 69 S. Ct. 114; Buck v. California (1952), 343 U. S. 99, 96 L. Ed. 775, 72 S. Ct. 502, reh. den., 343 U. S. 932, 96 L. Ed. 1341, 72 S. Ct. 756; Durley

v. Mayo (1956), 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806.

"A federal question involved in a case in a state court will be deemed to have been passed upon, *either necessarily or hypothetically*, by the state court where that court's discussion of the question is relevant only upon the assumption *that its decision of the question of state law involved in the case was such as to give occasion to consider the federal question.* Herb v. Pitcairn (1945), 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459.

"And the fact that a *state court purports to rest its decision largely on state law does not eliminate the duty of the Supreme Court* to consider a federal question, properly raised and presented, which is necessarily, *although impliedly*, adjudicated by the state court. Grand River Dam Authority v. Grand-Hydro (1948), 335 U. S. 359, 93 L. Ed. 64, 69 S. Ct. 114."

We now pass to the remaining five questions, each of which we believe raise violations of the due process rights and equal protection of Petitioner under the law. In connection therewith, we would like to cite the following additional legal authorities:

The Connecticut Supreme Court of Errors held in *Loretta Massa v. Louis Nastri, et al., 125 Conn. 144, 120 A. L. R. 839:*

"A right of action, including one for personal injuries, *is a vested property interest, before as well as after judgment*, at least 'where it comes into existence under common-law principles, and is not given by statute as a mere penalty or without equitable basis.' Siller v. Siller, 112 Conn. 145, 150, 151 A. 524, 525, quoting Judge Cooley in Dunlap v. Toledo, A. A. & G. T. Ry. Co., 50 Mich. 470, 474, 15 N. W. 555. See, also, Hubbard v. Brainard, 35 Conn. 563, 576."

In *Ladner v. Siegel*, the Supreme Court of Pennsylvania in *298 Pa. 487, 68 A. L. R. 1172*, said as follows:

"We have no doubt that, when the Federal Constitution said: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law,' it included all functionaries of state government, judicial as well as political. (Scott v. McNeal, 154 U. S. 34, 35, 35 L. Ed. 896, 897, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 266, 41 L. Ed. 994, 17 Sup. Ct. Rep. 992), and the courts may not, through judicial decrees or judgments, violate the due process or equal protection clause. The state cannot, through legislation, take away a vested right secured by a final judgment (Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421, 15 L. Ed. 435; McCullough v. Virginia, 172 U. S. 102, 43 L. Ed. 382, 19 Sup. Ct. Rep. 134), neither may a court take away a vested right secured by a valid decree or judgment. The 'term rules,' our rules of court, become peculiarly applicable in the enforcement of the principle (Wetmore v. Karrick, 205 U. S. 141, 51 L. Ed. 745, 27 Sup. Ct. Rep. 434) as to all actions or proceedings that properly come within it. In Nesbit v. Riesenman, supra, we said: 'The same reason that would strike down an Act of Assembly regulating nuisances, as an infringement of rights guaranteed by the 14th Amendment, would, no doubt, condemn a decision of a court that would hold a particular act a nuisance, or its repetition a nuisance per se; that is, that the action is arbitrary, unreasonable, or an unjust discrimination.' But, says the Federal Supreme Court: 'We cannot interfere, unless the judgment amounts to *more arbitrary or capricious exercise of power, or is in clear conflict with those fundamental* "principles which *have been established in our systems of jurisprudence for the* protection and enforcement of private rights".' American R. Exp. Co. v. Kentucky, 273 U. S. 269, 71 L. Ed. 639, 47 Sup. Ct. Rep. 355; Corrigan v. Buckley, 271 U. S. 323, 70 L. Ed. 969,

46 Sup. Ct. Rep. 521; West v. Louisiana, 194 U. S. 258, 48 L. Ed. 965, 24 Sup. Ct. Rep. 650."

In the case of *Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 41 Law Ed. 979, on page 984,* this Honorable Court, speaking through Mr. Justice Harlan, says:

"It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. United States v. Cruikshank, 92 U. S. 542, 554 (23: 588, 592); Leeper v. Texas, 139 U. S. 462, 468 (35: 225, 227). *But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form.* This court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U. S. 97, 102 (24: 616, 619). *The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law.*"

We quote the argument raised before the Supreme Court of Texas verbatim so as to show the due process clause was sufficiently invoked:

We now pass to a discussion of the questions raised by Petitioner's last six points concerning the error of the Court of Civil Appeals in overruling Appellant's Motion for Judgment Non Obstante Veredicto, and complaining of the fact that the answers of the jury were so conflicting on the issue of contributory negligence as to entirely nullify and destroy one another. We here set out the issues in their entirety upon which complaint is made. We here do so:

"SPECIAL ISSUE NO. 55.

"Do you find from a preponderance of the evidence that the act of Norman Brown, in crawling under the train of the defendant at the time and place in question, failed to exercise that degree of care which would have been exercised by boys of his age, experience and intelligence under the same or similar circumstances?

"Answer 'He did fail' or 'He did not fail.'

"Answer: 'He did fail.'

"SPECIAL ISSUE NO. 56.

"Do you find from a preponderance of the evidence that such failure, if any, you have found of Norman Brown, was a proximate cause of his injuries and damage?

"Answer 'Yes' or 'No.'

"Answer: 'Yes.'

"SPECIAL ISSUE NO. 57

"Do you find from a preponderance of the evidence that Norman Brown, at the time and place in question,

crawled under a train of the defendant without first attempting to determine whether an engine was attached thereto?

"Answer 'He did not attempt to determine whether an engine was attached thereto' or 'He did attempt to determine whether an engine was attached thereto.'

"Answer: 'He did attempt to determine whether an engine was attached thereto.'

"SPECIAL ISSUE NO. 58.

"Do you find from a preponderance of the evidence that the act of Norman Brown, if any, in crawling under a train of the defendant without first attempting to determine whether an engine was attached thereto, at the time and place in question, if you have so found, constituted a failure to exercise that degree of care that would have been exercised by boys of Norman Brown's age, experience and intelligence under the same or similar circumstances?

"Answer 'It did not constitute such a failure' or 'It did constitute such a failure.'

"Answer:

"SPECIAL ISSUE NO. 63.

"Do you find from a preponderance of the evidence that Norman Brown failed to use the care for his own safety that would have been used by boys of Norman Brown's age, experience and intelligence under the circumstances as they existed at the time of and just prior to the time of the accident?

"Answer 'He did so fail' or 'He did not so fail' as you may find.

"Answer: 'He did so fail.'

"SPECIAL ISSUE NO. 64.

"Do you find from a preponderance of the evidence that such failure, if any, of Norman Brown, was a proximate cause of his injuries and damage?

"Answer 'Yes' or 'No.'

"Answer: 'Yes.'

"SPECIAL ISSUE NO. 65.

"Do you find from a preponderance of the evidence that Norman Brown, before he crawled under defendant's train at the time and place in question, failed to keep a proper lookout for switching movements in and upon defendant's tracks?

"Answer 'He did so fail' or 'He did not so fail.'

"Answer: He did so fail.'

"SPECIAL ISSUE NO. 66.

"Do you find from a preponderance of the evidence that the failure of Norman Brown, if he did so fail, to keep a proper lookout constitutes a failure to exercise that degree of care that would have been exercised by boys of Norman Brown's age, experience and intelligence?

"Answer 'It did,' or 'It did not.'

"Answer: 'It did.'

"SPECIAL ISSUE NO. 67.

"Do you find from a preponderance of the evidence that such a failure, if any, was a proximate cause of Norman Brown's injury?

"Answer 'Yes' or 'No.'

"Answer: 'Yes'." (Tr., pp. 66 and 67.)

"SPECIAL ISSUE NO. 68.

"Do you find from a preponderance of the evidence that Norman Brown, at the time and place in question was not aware of the danger, if any, and risk, if any, in crawling under the box cars in question on the occasion of the injury to said Norman Brown?

"Answer 'He was not aware of the danger, if any' or 'He was aware of the danger, if any.'

"Answer: 'He was not aware of the danger, if any.' (Tr., p. 68.)

In *Ford v. Carpenter, 216 S. W. 2d 558*, the Supreme Court of Texas said at page 562 of its opinion:

"It is the duty of the trial court to reconcile apparent conflicts in the jury's findings if this can be reasonably done *in the light of the pleadings and the evidence*, the manner in which the issues were submitted, and in view of the other findings when considered as a whole. Texas Indemnity Ins. Co. v. Bridges, Tex. Civ. App., 52 S. W. 2d 1075, writ refused; Merritt v. King, Tex. Civ. App., 66 S. W. 2d 464, writ refused."

In doing this, there is a well established rule of construction that the courts in Texas have followed which is that specific findings control general ones. In *Walker v. Houston Electric Co., 155 S. W. 2d 973 (writ refused)*, at page 975, it is said:

"The courts of this state have uniformly held that apparent conflicts in the jury's answers to special issue submitted should be reconciled if this can be reasonably done in the light of the facts in a particular case, the pleadings and evidence, the manner in which the issues were submitted, and in view of the other findings when considered as a whole, and that findings

on ultimate facts will control those on merely evidentiary issues, *and that specific findings will control general ones*, and that, if, upon a reasonable interpretation of the findings, it appears that they are not in real and irreconcilable conflict, they then form the proper basis for judgment. Aranda v. Texas & N. O. Ry. Co., Tex. Civ. App., 140 S. W. 2d 236, 240; Graham v. Hines, Tex. Civ. App., 53 S. W. 2d 151; First National Bank v. Rush, Tex. Com. App., 246 S. W. 349; 41 Tex. Jur. 1224."

We have heretofore in our original application, shown by the undisputed evidence that the boys, prior to going under the train, all swore that they attempted to determine by looking both ways and listening if it was safe to go under said train. S. F. Vol. 2, pages 342-347, Petitioner's Application, page 9. S. F. 245-247, Petitioner's Application, page 10. The Court, therefore, *has a finding, in view of the decision in the* Ford *case, supra, which means that the jury found, in answer to Special Issue No. 57, in effect, that the boys looked and listened in an attempt to determine whether an engine was attached to the train. This was a specific inquiry.* Special Issue No. 55 is a general issue inquiring whether or not Norman Brown, in crawling under the train, failed to exercise that degree of care which would have been exercised by boys of his age, experience and intelligence. Special Issue No. 63 likewise is a general issue generally inquiring whether Norman Brown used the care for his own safety that would have been used by boys of his age, experience and intelligence under the circumstances. *Special Issue No. 65, finding that Norman Brown failed to keep a proper lookout before he crawled under the train at the time and place in question, is clearly in conflict with*

Special Issue No. 57, and its correlary issues Nos. 66 and 67, are likewise, in conflict with said findings in answer to Special Issue No. 57. It is quite apparent that the trial court submitted the only issue in Special Issue No. 57 that was the ultimate issue in this case. Issues Nos. 55, 63, 64, 65, 66 and 67 constitute only the submission of a different shade or type of the same issue and are mere surplusage and should be by this Court disregarded. Complaint was made at the time of the submission of these issues that same were repetitious and constituted the submission of general issues already covered by specific issues. These exceptions were taken by Petitioner in the court below, as same is shown on page 41 of the Transcript, and complaint made of same on motion for a new trial as well as in the motion for judgment non obstante veredicto. It is said by Judge Hickman, in the recent case of *Texas & N. O. R. R. Co. v. Hays, Vol. 25, Issue 40 of the Texas Supreme Court Reporter*, published July 14, 1956, at page 479:

> "The defendant is not entitled to a general submission of contributory negligence when the only issue of contributory negligence raised by the evidence has been submitted specially."

In other words, it was held that the defendant had a choice between a special submission and general one, but, as Judge Hickman said, he is not entitled to both. The trial court violated this rule. Therefore, all findings, except the finding to Special Issue No. 57, should be disregarded. In the alternative, there can be no question but that the finding of the jury, in answer to Special Issue No. 57, conflicts

with the finding of the jury in answer to Special Issues Nos. 55, 56, 58, 63, 64, 65, 66 and 67.

We have heretofore cited in our original application cases clearly supporting this position. Since the argument there is brief, we re-quote from same as follows:

> "In *Haney, et al. v. Texas & N. O. R. Co., 119 S. W. 2d 714*, in which it was held that a finding of non-negligence in keeping a proper lookout, conflicts with the finding of negligence in not discovering a train. Another case in point is the case of *Edson, et al. v. Perry-Foley Funeral Home, 132 S. W. 2d 282*, in which the Court held that a finding that a party ascertaining that there was no danger before crossing a street and one finding that he failed to keep a lookout, conflict. In other words, this decision holds that a failure to keep a lookout conflicts with the finding that a plaintiff was not negligent to cross the street without seeing whether it could be done in safety. Another case in point is the case of *Graham v. Dallas Ry. Terminal Co., 165 S. W. 2d 1002*, in which a finding that a party was negligent in moving to a certain place, conflicted with the finding that he was not negligent in the same respect. A case clearly in point is the case of *Texas & N. O. R. Co. v. Young, 148 S. W. 2d 229*, in which the Court held that a finding of a failure to keep a proper lookout and one using due care, was in conflict. This case is clearly in point because here we have a finding that Norman Brown attempted to determine whether the engine was attached to the train and, further, that he was not aware of his danger and the risk in crawling under said train at the time he did. A finding that he looked and listened and could not see or hear a train. This cannot be reconciled with the finding that he failed to keep a proper lookout or that he failed to exercise reasonable care under the circumstances."

In other words, in answer to Special Issue No. 57 the jury found that the boys looked and listened and tried to discover a train at the only time when a discovery of the train could have meant anything with reference to their safety. The answers to the other issues, most of which are repetitious, finds that they generally failed to keep a lookout, and generally failed to exercise that care that boys of their own age, experience and intelligence should have exercised. There is no species of reasoning that will reconcile these findings and it is difficult to determine how any judgment was entered in this case for the respondents.

We would like to add to the cases cited in our original application the case of *City of Panhandle v. Byrd, 106 S. W. 2d 660*, in which the Commission of Appeals, speaking through Mr. Justice Hickman, said in part as follows:

> "The jury found that the negligence on the part of the defendant in dragging the chain behind the grader was a proximate cause of the injury received by the plaintiff, thereby finding that it ought to have been reasonably foreseen or reasonably anticipated by one in the exercise of ordinary care that the injury complained of or some similar injury would naturally or probably result in the light of the attending circumstances. Upon the request of the defendant the court then submitted the following issue to the jury: 'Was the misfortune which befell plaintiff, or some similar event, something which a person of ordinary prudence should have reasonably foreseen beforehand as likely to occur from dragging the chain in question behind the grader.' To this issue the jury answered, 'No.' The court should not have submitted the requested issue. It comprehended but one element of the ultimate issue proximate cause, which had been submitted in the

main charge. But our question is not whether it should have been submitted. It is one of conflict of findings, and we are unable to reconcile them on any reasonable ground. They are so conflicting in a material and essential issue in the case as to be mutually destructive. Texas Utilities Co. v. West (Tex. Civ. App.), 59 S. W. 2d 459 (error refused). For this error the judgments of the trial court and Court of Civil Appeals must be reversed and the cause remanded."

No one can consider the issues hereinabove set out without reaching the conclusion as set out by the Amarillo Court in *Sinclair-Prairie Oil Co. v. Beadle, 89 S. W. 2d 426*, in which the Court said:

"Aside from all of the alleged errors urged in the brief, it becomes our duty to reverse the judgment and remand the cause because the jury's findings are conflicting and are too uncertain to sustain the judgment rendered. *The law is established that when the verdict is contradictory or vague and uncertain, it is the duty of the trial court to set it aside* and grant a new trial, and that no judgment should be entered upon such a verdict.

"The Sinclair-Prairie Oil Company alleged that upon the occasion in question plaintiff was guilty of negligence which proximately caused, or contributed to cause, the collision in question, and alleged resulting injuries. The court submitted numerous issues, the second being as follows:

"'Special Issue No. 2.

"'(a) Do you find from a preponderance of the evidence that plaintiff failed to keep a lookout for automobile traffic traveling West on the North side of Tenth Street on the occasion in question? If so

"'(b) Was such failure, if any, on the part of the plaintiff to keep a lookout for such traffic negligence? If so

"'(c) Was such negligence, if any, a proximate cause of the injuries received, by him on the occasion in question, if any?'

"The jury answered subdivision (a) in the negative, and subdivisions (b) and (c) in the affirmative, from which it clearly appears that the jurors were confused and did not understand fully and clearly the issues submitted. If plaintiff kept a lookout, he could not be negligent, and absent negligence, there could not be a proximate cause of his injuries. Answer to subdivisions (b) and (c) contradict the answer to subdivision (a) and render the verdict so uncertain that no judgment could be entered upon it.

"Special Issue No. 3 inquired:

"'If you have answered Special Issue 1-a "Yes," and have answered (b) of Special Issue 2 "yes," then you will answer further:

"'(a) Do you find from a preponderance of the evidence that plaintiff was guilty of contributory negligence, as that term is above defined, in so failing, if he did, to keep a lookout for automobile traffic traveling West on the North side of Tenth Street on the occasion in question?

"'(b) Do you find from a preponderance of the evidence that plaintiff was guilty of contributory negligence, as that term is above defined, on the occasion in question?'

"These subdivisions were both answered in the negative. It is not clear why Special Issue No. 3 was submitted after the submission of special issue No. 2 unless the trial court intended to submit an issue as to plaintiff's negligence in issue No. 2, and as to contributory negligence in issue No. 3 and this may have led to the confusion manifested by the answers of the jury.

"There is no assignment by either party raising this question, but it is settled law that a verdict which is contradictory and uncertain, to such an extent that it will not support a judgment, presents fundamental error. Miller v. Texas Employers' Ins. Ass'n (Tex. Civ. App.), 63 S. W. 2d 883; Traders and General Ins. Co. v. Emmert (Tex. Civ. App.), 76 S. W. 2d 208; French v. Hill (Tex. Civ. App.), 69 S. W. 2d 828; Garlitz v. I.-G. N. Ry. Co. (Tex. Civ. App.), 11 S. W. 2d 591; Barnes Bros. v. I. & G. N. Co. (Tex. Com. App.), 1 S. W. 2d 273; Northern Texas Traction Co. v. Weed (Tex. Com. App.), 300 S. W. 41; Boltinghouse v. Thompson (Tex. Civ. App.), 291 S. W. 573."

In the case of *Texas Utilities Co. v. West, 59 S. W. 2d 459*, the Court said:

"The appellant, by proper assignment, contends that the judgment rendered against it was unwarranted and unsupported by the verdict, because of the conflicting findings of the jury on certain issues.

"Special Issue No. 14(a), submitted by the court in his main charge, is:

"'Special Issue No. 14(a). Could the defendant have reasonably anticipated prior to the time of O. F. West, deceased, was killed, that the said O. F. West, might reasonably be expected to install a radio in his house on the premises where he was killed, and that he might reasonably be expected to install said radio and to suspend an outside aerial wire consisting of bare copper wire, from a connection with said radio, in his said residence, above and across defendant's high-tension wire, to the windmill tower located on said premises, and in such proximity to the high tension wire, that in the suspension of said aerial wire, that same might come in contact with defendant's said high tension wire, or one of them, where the said breaks and abrasions, if any, in the insulation around defendant's high tension wire, or where the amount of insulation

around the high tension wire was insufficient, if you find it was insufficient?' To which the jury answered: 'Yes.'

"'Special Issues Nos. 14, 15 and 16 submitted by the Court at the request of appellant read as follows:

"'Defendant's Requested Special Issue No. 14: Should a person of ordinary prudence have reasonably foreseen that someone might probably get a bare wire in contact with the defendant's electric wire or wires in question in the manner which O. F. West did, or some similar manner, with the rest of the bare wires hanging down on the ground, and then while standing on the ground attempt to handle the said wire in the way and manner attempted by said West or some similar way or manner?'

"'Defendant's Requested Special Issue No. 15: Would a person of ordinary prudence have reasonably foreseen that some body might probably get a bare wire in contact with the defendant's wire or wires in question in the manner in which the deceased, O. F. West, did, or some similar manner, with part of the bare wire hanging down to the ground, and that as a result the said wire would become charged with electricity sufficient to hurt or kill the person attempting to handle same?'

"'Defendant's Requested Special Issue No. 16: Would a person of ordinary prudence have reasonably foreseen that someone might probably get a bare wire in contact with the defendant's wire or wires in question in the manner in which the deceased, O. F. West, did, or some similar manner, with part of the bare wire hanging down to the ground, and then attempt to handle the said wire in some way or manner that would cause said hanging wire to become charged with electricity that would hurt or kill the person in contact therewith?'

"Each of said last issues were answered in the negative.

"'In Fort Worth & D. C. Ry. Co. v. Armitage, 39 S. W. 2d 108, 112, it is said by Chief Justice Hall of this court that:

"'To be the proximal cause, the injury must be the natural and probable consequence of the act complained of and of that character which should reasonably have been foreseen as such a consequence in the light of attending circumstances. Eames v. T. & N. O. Ry. Co., 63 Tex. 660; T. & P. Ry. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162; Steed v. G. C. & S. F. Ry. Co. (Tex. Com. App.), 231 S. W. 714; Id. (Tex. Civ. App.), 209 S. W. 772; Galveston, H. & S. A. Ry. Co. v. Bell, 110 Tex. 104, 216 S. W. 390.

"'These and other cases hold that foreseeableness is a necessary element of proximate cause. Linn Motor Co. v. Wilson (Tex. Civ. App.), 14 S. W. 2d 867; Blanch v. Villiva (Tex. Civ. App.), 22 S. W. 2d 490.'

"See also Enterprise Company v. Alexander (Tex. Civ. App.), 6 S. W. 2d 423.

"'The trial court recognized the law as above announced in the issues submitted in his main charge and at the request of appellant, but the findings of the jury on the question of foreseeableness are in irreconcilable conflict. West Lumber Co. v. Keen (Tex. Com. App.), 237 S. W. 236; Southwest Bithulithic Co. v. Dickey (Tex. Com. App.), 28 S. W. 2d 264; San Antonio & A. P. Ry. Co. v. Milam County (Tex. Civ. App.), 191 S. W. 571. This assignment is sustained'."

Bearing in mind the law as announced in the above cases, we have a jury finding that Norman Brown, before crawling under the train, attempted to determine whether an engine was attached thereto. The jury, under the decision

of this Honorable Court in *Ford v. Carpenter*, supra, must determine how that determination was made from the evidence itself which was, from all the boys, that they looked and listened. We have heretofore gone to great length to show that the findings that the boys were guilty of contributory negligence have no support in the evidence. We spent many pages of our original application showing that the boys could not have possibly seen or heard the train at any time, particularly at the time when they attempted to cross at the point where they had been given permission to cross by the switching foreman. If the Court rules that those issues are supported by the evidence, then other issues finding that they failed to look or listen or finding that they could have seen the engine in time to have discovered it are clearly in conflict with the finding of the jury to Special Issue No. 57 and Special Issue No. 68. The combined effect of the answers to Special Issues No. 57 and No. 68 is that the boys by looking and listening attempted to determine if an engine was attached to the cars, but could not see or hear one. Other issues finding that they failed to look and listen and that they failed to exercise care and further finding that if they had done so the accident could not have happened are clearly in conflict. When the evidence is considered, the findings of the jury are so vague and contradictory that no judgment can be entered in this case for anyone unless the Court enters a judgment for petitioners herein upon our contention that the only specific finding and the only one supported by the evidence is a finding that the boys did attempt to determine whether

an engine was attached to the train prior to going between the cars.

We now pass to Petitioner's Point No. Three, which contends that the finding of the jury in answer to Special Issue No. 68 was such as to acquit Norman Brown of contributory negligence in this case. This point has been fully discussed in our original application. However, we have heretofore failed to point out to this Honorable Court the grave error committed by the Amarillo Court when, in an apparent effort to assuage their conscience, they start off their highly misleading and unfair opinion by discussing how intelligent the evidence showed Norman Brown to be. No motion was made in the trial court by respondents, who prepared Special Issue No. 68, to have same set aside because of lack of evidence to support said finding. It is the unquestioned law of Texas that unless a motion for judgment non obstante veredicto is made, the trial court and the appellate court have no authority to disregard jury fact findings on the theory that it was not supported by the evidence. Such is the rule as announced in these three cases: *Christopherson v. Whittlesey, 197 S. W. 2d 384, ref. n. r. e.; D Bar Ranch v. Maxwell, 170 S. W. 2d 303; Wheeler v. Wallace, 167 S. W. 2d 1043.*

We have heretofore pointed out that petitioner did not, in the trial court, attempt to plead a want of discretion upon the part of Norman Brown. The respondents by requesting and preparing these issues, however, waived the failure of petitioners to plead same, and there can be no question but that the purpose of respondent's counsel in

submitting Speciai Issue No. 68 was to determine whether Norman Brown had sufficient discretion and intelligence to appreciate his risk and danger. This is clearly shown by the correlary issue which respondents prepared and had submitted, Special Issue No. 69, which inquired of the jury: "Do you find from a preponderance of the evidence that boys of Norman Brown's age, experience and intelligence at the time and place in question would not have been aware of the danger, if any, and risk, if any, in crawling under said box cars?

It must now be apparent to this Honorable Court that cases such as those cited by the respondent in briefs filed before this Honorable Court to the effect that railroads do not have to police their cars in order to eject trespassers are not at all in point with a situation such as we have here. Even though the Amarillo Court claimed that the boys had not been given permission by the switching foreman, Washington, to catch this train to Dallas, and even though Washington, in his recorded telephone conversation with one of petitioner's counsel which was introduced in evidence, denied that he had held any conversation with the boys or had given anyone the right to catch the train to Dallas, still, upon cross-examination upon the trial of this cause, Washington admitted, not only that he told the boys where the train was that was getting ready to go to Dallas, but also that he pointed out to them upon what track said train was and about the time that it would leave. He thereafter watched the boys depart and slowly walk down the tracks toward the train after having told them that they

could cut across at a point about even with the depot. An examination of the photographs introduced in evidence will show that the Slaton headquarters of the respondent, with its many tracks running several miles and curving in several different directions and with hundreds of box cars upon them, constituted a hidden danger to these youthful minors. This accounts apparently for the jury's finding in answer to Special Issue No. 30 that Washington should have warned Norman Brown that there was not only a train upon Track 6 or 7, or upon a track preparing to go to Dallas, *but that there was a long string of box cars standing still upon Track No. 3 and switching operations were being carried on which might result in cars that were apparently standing still being suddenly moved. The jury, by their verdict, has found that these boys were invited into a hidden death trap without warning by C. T. Washington.* Washington, by his own testimony, admits that this habit of people catching trains was something that had gone on for many years in the Slaton yards.

The purpose of all tort law is the protection of society. Society and the law has always considered that the duty of care owed one of immature and youthful years is greater than that owed an adult. We think the evidence in this case is such that even an adult, had he been injured under these circumstances, could and should have recovered.

It is a sad commentary upon justice in Texas that the Amarillo Court would say that permission had not been given these boys to catch the train contrary to the undisputed evidence of C. T. Washington as same has been set

out in petitioner's Reply to Respondent's Application for Writ of Error. It becomes doubly shameful when the Amarillo Court was reminded in the Motion for Rehearing *that the trial court assumed, in its Special Issue No. 1, that the railroad had given the boys permission to catch the train. Justice has reached a sad state of affairs when the Amarillo Court would not discuss the combined effect of the conflict between Special Issues Nos. 57 and 68, but confined discussion of the conflict to only Special Issue No. 68 which was not material conflict in this case at all.* Many of petitioner's points in the opinion of the Amarillo Court were not correctly set forth. *This Honorable Court has now been called upon the place its stamp of approval upon such an opinion.*

What is Norman Brown going to think of the processes of justice in this country when he reaches maturity if this Honorable Court forever closes the gate upon his rights when they have been thus far so recklessly handled?

We recognize that this Honorable Court, whose personnel we have the greatest admiration for, has made a great record in cleaning up the docket and in rendering speedy justice, but isn't it possible, in fact, indeed, isn't it probable, that if this Honorable Court continues to travel at such a blinding rate of speed that litigants and lawyers alike may well feel that they have not had their day in Court? Wouldn't it be a tragic calamity if the *rules providing that no case shall be reversed except* upon a showing of prejudice that these rules, enacted for the express purpose

of seeing that only substantial errors resulted in reverses, *should be converted by this Honorable Court into instruments for the purpose of destroying sacred constitutional guarantees such as are involved in this case, the establishment of a fair and an impartial jury.* It is in the belief that this Honorable Court will correct the grievous harm that has been done petitioner that we have gone to such lengths to have prepared and printed this argument on Motion for Rehearing.

We have quoted the portion of the arguments made on these points before the Supreme Court in the supplemental argument of petitioner on motion for rehearing of application for writ of error, so as to show that this portion of the due process clause was invoked. However, it is believed to be the settled rules of this Honorable Court that where the case is properly before this Court on constitutional grounds, the jurisdiction of this Court extends to the review of all questions. *James-Dickinson Farm Mortgage Co. v. Harry, Ill. 1926, 47 S. Ct. 308, 273 U. S. 119, 71 L. Ed. 569.*

The verdict of the Jury for $150,000.00 has not only been taken away from the horribly mutilated minor by the Trial Court, but the Amarillo Appellate Court, and Supreme Court of Texas affirmed the Court denying recovery, not only when the findings were conflicting, but when there was no evidence to sustain the finding of contributory negligence. This was forcibly brought to the attention of both the lower Court and the Supreme Court of Texas in

the following arguments submitted to both Courts from which we here quote verbatim:

Plaintiff's Motion for Judgment appears on Pages 95 to 97 of the Transcript, and is as follows:

NOW COMES the plaintiff in the above entitled and numbered cause, and moves the Court to enter judgment for plaintiff upon the verdict of the jury; and, in the alternative, moves the Court to enter judgment for the plaintiff and to disregard the answers of the jury upon motion for judgment notwithstanding the verdict, to Special Issues Nos. 1, 55, 56, 63, 64, 65, 66 and 67, as being without support in the evidence. And, further moves the Court to disregard said issues as mere surplusage in that said issues as submitted do not make any inquiry or permit any finding which would convict Norman Brown of negligence in that the issue as submitted does not inquire as to what ordinarily prudent boys of the age, experience, and intelligence of Norman Brown would have done under the same or similar circumstances, it being incumbent upon the defendant to plead, prove, and procure findings of contributory negligence upon the part of Norman Brown, and utterly failed to discharge this burden by submission of issues that did not inquire or make inquiry as to what ordinarily prudent boys of Norman Brown's age, experience, and intelligence would have done under the same or similar circumstances, since under the well established law the Court has not in said issues submitted a proper charge as to contributory negligence, if any, of Norman Brown. Plaintiff would show that the undisputed evidence shows

that Norman Brown and his two companions looked, listened, and could not have seen the engine attached to said box cars standing on Track 3 prior to attempting to cross between said cars; and, would further show the Court that in answer to Special Issue No. 57, the jury has found that Norman Brown did attempt to determine whether an engine was attached to said box cars prior to crawling under the train; and, in answer to Special Issue No. 68, found that Norman Brown, at the time that he crawled under the box cars, was not aware of his danger and risk and, in this connection, plaintiff would show that the finding of Special Issue No. 68 renders immaterial the findings of the jury to the issues complained of had they been properly submitted, in that it constitutes a finding that the capacity and intelligence of Norman Brown was such that he did not understand the risk and danger or appreciate the danger that there was in crawling under the box cars, and under such circumstances there can be no further inquiry or findings of contributory negligence.

In any event, the undisputed evidence shows that, from the defendant's own Yardmaster Pierce, that the boys could not have seen the train or known of its presence prior to crawling under the train at the point where they attempted to crawl under it. The jury has, in effect, found that the boys did not know of the presence of any switching operations being carried on; and that the defendant's employee Washington knew that said box cars would constitute a certain danger as to the said Norman Brown and his companions and, further, knew that they would attempt to crawl under the box cars on Track 3 for at least

twenty minutes prior to the accident in question and, thereafter, failed to warn them of this danger; and that such findings amount to findings of discovered peril which would render any findings of contributory negligence of no controlling importance; and, further, that the jury under the undisputed evidence could not resort to surmise and suspicion to establish the findings complained of in the issues named; and that, under such circumstances, this Honorable Court should enter judgment on the verdict for the plaintiff, or, in the alternative, disregard the answers of the jury to Special Issues Nos. 1, 55, 56, 63, 64, 65, 66 and 67 as being without support in the pleadings of the defendant and the evidence adduced as to constitute findings that may be regarded as mere surplusage and to enter judgment for the plaintiff upon the verdict of the jury.

WHEREFORE, this motion having been set by agreement of the parties, and both parties having appeared, it is moved that plaintiff have judgment based upon the findings of the jury; and, in the alternative, that plaintiff be granted judgment non obstante veredicto; and for such other and further relief as the plaintiff may be justly entitled to receive.

The evidence as to what the boys actually did prior to the accident in question is to be found in the testimony of Norman Brown and his two companions. Norman Brown testified as follows:

"Q. Then, what did you do?

"A. Then we got in Herman's car, all four of us, that's Allen and Ronnie and Herman and myself, and

we drove to the store and Herman gave us $1.75 and said that he owed me that, at least, for helping him fix his car, so we went into the store and we got some groceries and then we drove down to the depot of the Slaton yards, train yards, and Herman got out of the car; he said he could find out if there was a train going east that evening. So he started towards the station there, he didn't get all the way to the station, and he saw a man coming out of the yards, so he stopped there and waited and the man came over to him and they stood there and talked for, oh, two or three minutes. So Herman came back to the car and he said that the man said there was a car—a train going to Dallas that evening but he didn't know when it would leave, and he said we'd have to go down farther in the yards to find out.

"Q. Did you go down farther in the yards?

"A. Yes, sir, we did.

"Q. About how far down—which direction, do you know?

"A. East.

"Q. How far east did you go down there in the yards?

"A. Oh, a half a mile, maybe a little more.

"Q. When you got down there, what did you do?

"A. We parked the car on a little—well, we drove down Railroad Avenue, I believe is the street there that runs parallel to the tracks on the south side. We drove down that street until we came to a little dirt road that turned off and went up into a kind of a parking lot, more or less, and we drove the car up there and stopped and Ronald Kalvin and I got out of the car and we walked across the tracks. We could see this little telephone booth thing across the tracks and there were two men sitting there in front of it, so we

got out of the car and walked across the tracks and we asked them if there was a train to Dallas that night and they said, yeah, there was; then, we asked them how was chances on getting a ride on it and they said—

"THE COURT: I'll overrule the objection.

"MR. COBB: Note our exception.

"MR. WATTS: Q. You were saying that you asked him how about the chances of getting a ride to Dallas?

"A. Yes, sir.

"Q. All right. Go ahead.

"A. He said it would be all right. He said, 'They do it all the time through here.' So—

"Q. They said it'd be all right that they do it all the time through here?

"A. Yes, sir.

"Q. All right.

"A. So we asked him when the train was going to leave and he said, 'Just in a little while,' so then we asked him where it was and he said it was either Track 6 or Track 7, I don't remember exactly which one it was. So we asked him which track was that and he pointed up the highway and he said, 'Right on down there,' so we still had our clothes and bundles and things in the car so we went back to Herman's car and got our clothes and our groceries—

"Q. Now, look, when you went across there, were you running in both directions or walking?

"A. We were walking.

"Q. Well, were you by yourself or did somebody walk along there with you?

"A. Ronald Kalvin was with me.

"Q. All right. Go ahead.

"A. So we went back to Herman's car and we got our clothes and our groceries and we said, 'Good-bye' to him and everything, so—

"Q. That's where you told Herman, 'Good-bye'?

"A. Yes, sir.

"Q. All right.

"A. So this long train was on Track 3, so while we were over there at the station, well, he—I mean at the telephone booth, we asked him how—he said there were empty cars on the train, so we asked him how far down they were and he said, 'About a half a mile,' so we asked him how far that was because neither one of the three of us could judge distance so he said it was just a little past the depot. So when we got our clothes and stuff and started back, we noticed this long train sitting on Track 3, so we decided we'd better walk down on the south side of it so we could see the depot so we'd know when we got about even with the empty boxcars. So we went on down beside the train on Track 3—

"Q. Well, now, just a second. During the time that you walked across to the railroad men there in front of the telephone booth, during the time that you talked to them, during the time that you walked back to the car, during the time that you were telling Herman good-bye and getting your clothes and the groceries and the bundles of clothing that you had out, *did you, at any time, see a switch engine or any other kind of engine?*

"A. *No, sir, we did not.*

"Q. *Did you, at any time, hear any bell or any whistle or did anybody tell you that the switching operation was being carried on in that yard and that the train was somewhere—*

"A. *No, sir.*

"MR. COBB: If the Court please, we want the same objections to that question.

"THE COURT: Yes, sir.

"MR. COBB: We except.

"MR. WATTS: Q. *Did anybody, at any time, warn you that you were in any danger at all?*

"A. *No, sir, they did not.*

"Q. All right. When you got down to where you thought you had reached about the point he had sent you to, what did you do then?

"A. *Well, we looked around to see if there was—we looked for an engine there. We stopped and looked both ways and we didn't see any engine or hear any sound of one or anything so we decided we'd go under it, see.*

"Q. *Did you think that that string of boxcars had an engine attached to it?*

"A. *No, sir. If I'd thought there'd have been an engine attached to it, I wouldn't have crawled under it.*

"Q. *Did you think that there was any danger at all to your trying to go under there in the few seconds that it would take you?*

"A. *No, sir.*

"Q. *If that railroad employee had told you to—that you couldn't catch a ride there, would you have attempted to catch it?*

"A. *No, sir.*" (S. F., Vol. II, pp. 342-347.)

We will not here repeat the testimony of his two companions in its entirety but Norman Brown's testimony was corroborated by them in all respects as the reading will disclose on pages 242 to 245 of the Statement of Facts,

nclusive. We quote the testimony of Ronald Kalvin as to what happened immediately prior to the accident, as follows:

"No, sir, I didn't notice any engines of any kind.

"Q. Did you ever hear—did you know that they were doing switching operations out there?

"A. No, sir, it was all quiet.

"Q. Did anybody tell you that they were doing switching operations out there in that yard?

"A. No, sir, they did not.

"Q. Did anybody warn you that these cars on any of those tracks might be moved at any time?

"A. No, sir.

"MR. COBB: If the Court please, we object to this as imposing a duty or seeking to impose a duty on the railway company that is not required by law, and it is unreasonable.

"THE COURT: Yes, sir.

"MR. COBB: Note our exception.

"MR. WATTS: Q. When you got down there, did you—did you look in any direction to determine if a train, by that time, had showed up or an engine?

"A. Yes, sir. When we got down to the spot where we were going to cross over Track 3 which the trains were on, we walked down a little ways west and looked around and walked back east and looked around and that was to see if there were any men around or any trains moving or whatever was happening, and then we looked under the train to see if anything was happening on the other side and it was all just as we had seen it when we started to walk down there; nothing was moving.

"Q. Was there anything to—what did—did you think that was just a stationary bunch of boxcars or not?

"A. Yes, sir, I did.

"Q. Did you think there was any—

"MR. COBB: Now, if the Court please, we object to this as to what he thought.

"MR. WATTS: We think it's material.

"THE COURT: I'll overrule the objection.

"MR. COBB: Note our exception.

"MR. WATTS: Q. If that hadn't happened to Norman, weren't you getting ready to go through there yourself?

"A. Right—right after him?

"Q. After Allen did?

"A. After Allen, yes, sir." (S. F. 245-247.)

Allen Wearing, the other companion of Norman Brown, corroborated Norman Brown's testimony, and we quote the following out of the testimony of Allen Wearing:

"Q. Uh-huh, And what happened, Allen, when you —when you got down there to the depot?

"A. Well, —

"Q. I want to ask you this. Was there—was there—did you see boxcars out there, was all you could see on that thing when you approached there that day was boxcars on those tracks?

"A. That's right.

"Q. Now, could you tell from the—whenever you got out there, or could anybody else that was wanting

to catch a train to Dallas tell, without finding out, what—what boxcar to get into?

"A. No, sir. I couldn't tell and I don't think anybody else could tell without information.

"Q. In other words, all it would present would be a row of boxcars on a whole lot of different tracks just like we have here, isn't that right?

"A. That's right.

"Q. All right. So then in order to find out what time a train was leaving for Dallas and where that train that was leaving for Dallas was located, what was it necessary for you or for anybody else, similarly situated, to do?

"A. It was necessary to acquire—that we acquired information from somebody, you know, that could tell us how we could get to Dallas.

"Q. Yeah. How did you go about doing that?

"A. Herman King got out of the car and he—he walked to the depot, and about that time a man swung off the train that was coming in and Herman approached him and what he said, I couldn't hear him from there, but Herman came back and said he asked the man when a train would leave for Dallas and the man didn't know exactly—the exact time but he said it would be leaving pretty soon and he didn't know what track it would be on. He said that we'd have to go farther down the line and ask the switchman.

"Q. All right. Now, is the road—is the route you pursued in going down that line shown in that picture?

"A. It was right—no, sir, it isn't.

"Q. Well, can you—can you show the jury the general direction, now, that you went? Would that road be located behind this building over here? (Indicating.)

"A. That's right, be going east.

"Q. Be going east. So you went down behind this building and went east how far?

"A. Well, as we later found out, it was a half a mile.

"Q. All right. Now, did you—what did you do when you got there?

"A. When we—when we got there we pulled up there and stopped, see, and Herman and I stayed in the car and Norm and Ronnie got out and approached this weather shack or telephone shack, whatever it was called, and there were two men there who were railroad—I presumed they were railroad employees, they had on railroad clothes. And when they came back, they told us—well, while they were standing over there, we saw—they were talking and we saw one of the railroad men point, and he pointed west. When they came back we asked what the score was, and Norman told me that the men said the train was leaving —

"MR. COBB: We object to this as being hearsay, outside of the presence of the defendant.

"Q. All right. Don't tell what Norm told you, now. In this photograph here, can you show the jury about where the colored man parked his car while the boys went across to that telephone booth?

"A. Yes, sir.

"Q. All right.

"A. Right about in here. (Indicating.)

"Q. All right. Let's mark that with an 'X'. Did you say along in here? (Indicating.)

"A. About right there.

"Q. All right. (Marking 'X' on photograph.) And, now, can you see that—did they get out of their car

and walk straight across the tracks, there was no—was there any boxcars there to keep them from walking straight across the tracks?

"A. At that time there wasn't, sir, they walked straight across.

"Q. And at that—at this time, there is?

"A. That's right, this boxcar right here (indicating) is in the way.

"Q. Walked straight across. Now, will you point—make an 'X' to the telephone booth where they walked to, as shown in that picture, and where they talked to the men?

"A. (Witness putting 'X' on telephone booth in photograph.)

"Q. All right. Now, that is Plaintiff's Exhibit No. 3. That 'X' is not very plain, Allen. It looks like it's part of the tracks. Let's draw a circle around that building, and a circle around this 'X.'

"A. (Witness drawing circle around telephone booth and 'X'.)

"Q. All right. Now, did we take a closer-up picture of that thing so as to get a better view of it that day?

"A. Yes, sir.

"Q. And is that a picture of it?

"A. Yes, sir, that is.

"Q. A picture of you and—

"A. Ronnie.

"Q. Ronald standing in front of it? This is Plaintiff's Exhibit 4. (Marked P-4.) Now, when Norman and Ronald came back, walked back here across the tracks to here, did they still have some bundles of

clothing and things that they had to pick up in addition to picking you up?

"A. Yes, sir. It was all in the car.

"Q. When they got back there, did they—did they—did you get out of the car at that point or did you go to a grocery store from that point or what did you do? What did they do at that point?

"A. We were—that's when I got out of the car—

"Q. All right.

"A. —and we got our clothes.

"Q. You got your clothes out of the car?

"A. That's right.

"Q. Did you—is that the point, or not, where you all left Mr. King?

"A. That's where we left him; the last time we saw him.

"Q. And then what did you do?

"A. We walked—we left the car and walked back here straight across. We walked down—we walked west between track two and three.

"Q. You walked west between track 2 and 3?

"A. That's right.

"Q. All right. Is this the path, then, that you were to be walking west down?

"A. Yes, sir.

"Q. That's—that's that path there, gentlemen, that you see there between these two tracks there, Tracks 2 and 3. (Showing photograph to jury.)

"COURT REPORTER: Can't hear you, Mr. Watts.

"Q. I say that's the track that you see there between those two tracks, 2 and 3. Is this a picture of the same track that you came down?

"A. Yes, sir, it is.

"Q. You were walking west?

"A. Yes, sir, coming out of the east.

"Q. Now, this is between 2 and 3, isn't it?

"A. That's right.

"Q. Now, draw a line there showing that track.

"A. (Witness drawing line showing track.)

"Q. All right. Of course, it goes away back up here. How far did you fellows continue to walk?

"A. Well, the—this railroad employee that was out there, the switchman, that told us about a—where to catch a train, he said it was just about a half a mile down and we didn't—at that time I couldn't tell you half a mile from a quarter of a mile and he said it'd be just a little past the depot.

"Q. All right. Okay. So you were watching the depot when you was walking that way?

"A. Yes, sir." (S. F., pages 35-41.)

Appellee's yardmaster, C. A. Pierce, who had served as yardmaster since 1949, testified (S. F., page 462) that the kids could not have told what the engine was going to do, the way the track was located, had they looked. (S. F., pg. 466.)

This is believed to be all of the testimony bearing on the issue of contributory negligence.

AUTHORITIES AND ARGUMENT UNDER POINTS ONE, TWO, THREE AND SEVEN

As stated in *30b, Tex. Jur., Sec. 91:*

> "A plaintiff, or injured person, who acted without knowledge of the danger will not be deemed responsible or barred of recovery. He cannot be held to have failed to have exercised ordinary care where the evidence shows a lack of knowledge. If he is ignorant of the danger and is not required to anticipate its presence, no duty exists to exercise such care. An issue as to contributory negligence on the part of the victim is not raised by the evidence where it appears that he had no knowledge of the danger and could not have foreseen the prejudicial occurrence."

One of the cases cited is an early Texas case of *Texas & Pacific Railway Company v. Bigham, 38 S. W. 162*, wherein it is stated:

> "The party is not to be deemed negligent to do or to fail to do an act when it was not anticipated, and should not have been anticipated, that it would result in injury to anyone. To require this is to demand of human nature a degree of care incompatible with the prosecutions of the ordinary avocations of life."

The Supreme Court of Texas again invokes this rule in *37 S. W. 2d 126, Union Stockyards v. Peeler*, and such is unquestionably the law of Texas. Among the cases cited in support of the text are *Haney v. Texas & N. O. R. Co., 119 S. W. 2d 714, Error Dismissed; Texas-Louisiana Power Co. v. Webster, 59 S. W. 2d 902; Texas-Louisiana Power Co. v. Webster, 91 S. W. 2d 302; Southwestern Gas & Electric Co. v. Lain, 139 F. 2d 142*, in which the Court held:

"There can be no contributory negligence where there is no knowledge of danger."

In the *Haney* case, the court held:

> "Now, if Haney was justifiably ignorant of the fact that the truck was approaching a railroad crossing, then he could not have been negligent in failing to discover the approach of the train. A traveler unfamiliar with a locality and excusably ignorant that he is approaching a crossing is under no duty of keeping a lookout for trains. 35 Tex. Jur. Sec. 334a, page 508; Texas & P. Ry. Co. v. Chapman, 57 Tex. 75. One is under no duty of guarding against a dangerous situation the existence of which he is justifiably ignorant of."

Under the findings of the jury, the plaintiff attempted to determine whether an engine was attached to the box cars. The manner in which he made this determination is without dispute. He and his two companions said that they spent some three or four minutes looking under the train, looking in both directions and could not see or hear anything that indicated that there would be any danger at all in attempting to cross between the box cars. How, then, can it be contended that the plaintiff was not justifiably ignorant of his danger?

Those issues finding that he failed to use the care for his safety that would have been used by boys of his age, experience and intelligence under the circumstances as they existed at the time of and just prior to the accident are utterly without support in the evidence as is Special Issue No. 64 finding this to be the proximate cause. Special Issue No. 55 finding that in crawling under the train he failed to exercise that degree of care which would have

been exercised by boys of his age, experience and intelligence under the same or similar circumstances also is utterly without support in the evidence and should be disregarded as should the answer to Special Issue No. 56.

The answers finding that he failed to keep a proper lookout before he crawled under the defendant's train at the time and place in question and that such was a proximate cause and that the failure to exercise that degree of care other boys of his age, experience and intelligence would have exercised under the circumstances, as found in Special Issues Nos. 65, 66 and 67, are utterly without support in the evidence. In other words, the undisputed evidence shows, from the testimony of the defendant's yardmaster, Pierce, that they (the boys) could not have seen the engine prior to crawling under the box cars, had they looked, and the undisputed evidence shows that they did look and couldn't see the engine. There is nothing that a human being could do, under the circumstances, be he child or adult, that would have disclosed the source of his danger. There was no care that could have made him conscious of his danger, under the undisputed facts in any of contributory negligence. The burden is upon the defendant to prove contributory negligence and proximate cause just as the burden is upon a plaintiff to prove negligence and proximate cause.

What is said in *Merritt v. Phoenix Refining Company, 103 S. W. 2d 415, on page 417*, is peculiarly in point:

> "Obviously, when a person, before attempting to go into a situation of potential danger, stops, listens and

looks in every direction whence such dangers might come, he has performed every possible duty imposed upon him in such situation, except the duty of avoiding any danger disclosed by such caution. If he has taken all those precautions exacted of him by the duty to keep a proper lookout, then a general finding that he negligently failed to keep such lookout will not be given effect."

Two other cases supporting our view are the cases of *Gulf C. & S. F. Ry. Co. v. Russell, 82 S. W. 2d 948*, and *Texas & N. O. R. Co. v. Young, 148 S. W. 2d 229*, wherein the court said:

"* * * *the operatives of the train could not have seen Russell if they had kept a reasonable lookout; that Russell was a trespasser and the company only owed him a duty as such; that in the absence of any evidence that the operatives could have seen him if they had kept a reasonable lookout, that phase of the case was not submitted to the jury.* The court said, in substance, that under the pleadings it was not only necessary for the plaintiff to prove that the train operatives did not keep a reasonable lookout, but also *to show that if they had done so they would have discovered plaintiff in time to have avoided the accident.*"

In this case, the defendant had the burden of proving not only contributory negligence but they also had the burden of proving same by a preponderance of the evidence and to prove that the contributory negligence of the plaintiff was more likely than the hypothesis that he exercised due care. This is established in the case of *Houston Lighting & Power Co. v. Taber, 221 S. W. 2d 339*, in which the court said on page 243:

"In Texas, contributory negligence is an affirmative defense, and, with respect thereto, a defendant has

the burden of proof. If on the issue of evidence, *or if the preponderance of evidence thereon balances, so that it cannot be determined whether the victim was negligent or not, the defendant has failed* to meet the burden of proof on his affirmative defense. See *Clark v. Hills, 67 Tex. 141, 2 S. W. 356.*"

Further, it is said in *Federal Underwriters Exchange v. Hightower, 161 S. W. 2d 338:*

"There is no direct evidence that the injury, so established, made possible an infection which would not nevertheless have come about. Causation is not established merely by showing that the infection followed the injury in point of time. It is not enough merely to show that the fall was sufficient to have caused an injury, and that such an injury could have made possible the damaging effects of the infection. A case cannot be established by piling one presumption, or inference, upon another presumption or inference. In testing the sufficiency of circumstantial evidence, we must apply the rule thus stated in 17 Tex. Jur. 908:

> " 'To establish a fact by circumstantial evidence, the circumstances relied on must have probative force sufficient to constitute the basis of a legal inference; it is not enough that they raise a mere surmise or suspicion of the existence of the fact or permit of a purely speculative conclusion. The circumstances relied on must be of such a character as to be reasonably satisfactory and convincing, or as it has been said, sufficient reasonably to produce belief of the existence of the fact which is sought to be shown by them. At all events they must not be equally consistent with the non-existence of the ultimate fact.' "

The finding of the jury in answer to Special Issue No. 68 finding, from a preponderance of the evidence, that

Norman Brown did not appreciate the danger or the risk, if any, in attempting to go between, or crawling under the defendant's cars, exempts the said Norman Brown from contributory negligence in any purported findings attempting to convict the said Norman Brown of contributory negligence even had they been supported by the evidence and even had they been properly submitted, as to what an ordinarily prudent boy Norman Brown's age, intelligence, experience, capacity and understanding would have done would be immaterial. The law on this is plain and well established in Texas. The rule laid down in *30B Tex. Jur., Sec. 101, p. 316*, is as follows:

> "In determining whether negligence is chargeable against a child who has passed beyond the age of responsibility, an inquiry as to the extent of his capacity to appreciate the dangers of the situation is of prime importance. The law requires that he exercise such degree of care as a person of his capacity would ordinarily exercise, under like circumstances. The matter of age, though germane to the question of capacity, is not necessarily of controlling force.
>
> "If the injured child was too young to appreciate the danger, his right of recovery depends on whether the defendant was negligent or ought to have foreseen and prevented the calamity. A child of very tender years may be presumed as a matter of law not to have sufficient discretion to appreciate dangers that would be obvious and apparent to one of maturer age. However, unless the victim was too young to be able to understand the peril, a question for the jury's determination is raised by the issue as to whether the child had power or capacity to appreciate the danger to which he exposed himself."

In the case of *St. Louis S. W. Ry. Co. v. Abernathy, 68 S. W. 2d 539*, the Court held as follows:

> "The employees had no right to permit or invite anyone to ride on that train. The boy was of the average intelligence of boys of that age. He had been frequently told not to go about the train, that he might get hurt or killed, but just in what way he might get hurt or killed was not told him, and he was not of sufficient intelligence or discretion to appreciate the danger he incurred, and, therefore, not chargeable with contributory negligence. The employees were negligent in not using proper care to prevent the deceased and other children from being on or about the train. The appellees were not guilty of contributory negligence."

In *City of Brownwood v. Anderson, 92 S. W. 2d 325*, the Court said:

> "It has been held by numerous decisions that a child under the age of seven years is presumed not to have discretion such as will enable him to avoid danger or dangerous places, and that as to children between the ages of seven and fourteen years, it is a question of fact as to whether they possess such discretion, Johns v. Fort Worth Power & Light Co. (Tex. Civ. App.), 30 S. W. 2d 549, 557 (writ refused).
>
> "(1) Appellee alleged in effect that on account of his immature years her son did not appreciate the danger to which he exposed himself, but his incapacity was an issue of fact to be determined by the jury because the testimony is that he was more than eight years of age, energetic, bright, and intelligent, with a sense of responsibility.
>
> "This does not bring him within the age at which courts have held a child to be exempt, as a matter of law, from the charge of contributory negligence;

neither does it place him at such age as the court will, as a matter of law, hold that he was responsible for his acts. It was a question of fact for the jury, to be determined upon the evidence adduced before them. If there was no evidence upon the subject, the issue should not have been submitted, or, having been submitted, the jury ought to have found for the defendant, because it devolved upon the plaintiff to show that, for want of discretion, the negligent act of the deceased was not imputable to him. St. Louis & S. W. Ry. Co. v. Shiflet, 94 Tex. 131, 58 S. W. 945, 947.

"(2) The rule in this state is that the question of discretion in children is a question for the jury. Dudley & Orr v. Hawkins (Tex. Civ. App.), 183 S. W. 776, 779.

"(3) In order to exempt the deceased from contributory negligence, the burden was on appellee to establish the issue of his want of discretion. Duron v. Beaumont Iron Works (Tex. Com. App.), 9 S. W. 2d 1104; City of Menard v. Coates (Tex. Civ. App.), 60 S. W. 2d 831."

In the *Johns* case, however, heretofore cited to this Court, the boy was 15 years of age; however, the above cases are clearly in point so as to show the finding of the jury in answer to Special Issue No. 68 which exempts and acquits Norman Brown of contributory negligence.

There was plenty of evidence on this finding in that the evidence shows that Norman Brown took his mother's car, without permission, was able to drive it 100 miles before wrecking it completely; thereafter, he failed to call his mother but simply left the car where it was wrecked. Thereafter, knowing that he was supposed to go to Dallas, he caught a ride with a negro man and went in a direction

that was some 150 miles out of the way by going to Slaton. While the evidence showed Norman Brown to be a powerful boy physically, these facts show that he was impulsive, reckless in his nature and did not have mature judgment and acted recklessly, needlessly and on impulses and, hence, that his capacity was lower than that of boys his own age and amounts to a finding by the jury that he did not have the capacity and did not appreciate the risk and danger in crawling under the box cars on the occasion in question; therefore, under the established law of Texas, he is exempt from being charged with contributory negligence.

The Commission of Appeals' opinion approved by the Supreme Court, styled *McCoy v. Texas Power & Light Company, 239 S. W. 1105*, cited by the Supreme Court as a controlling authority in Texas. In *Banker v. McLaughlin, 208 S. W. 2d 843, 847*. Of course, the *McLaughlin* case is not in point with the case at bar since we are not dealing here with an attractive nuisance and neither are we dealing with a known and obvious danger. I consider the *Banker v. McLaughlin* case to have been wrongfully decided since I believe a child 14 years of age should be cognizant of the danger of jumping into a swimming pool without knowing the depth thereof and one which has steep, rugged, natural terrain to constitute its walls just as much as a child would know the danger from jumping from a building, but, it has been many times held in Texas that the act of an adult who attempts to cross between box cars after making an effort to determine whether or not there is a train attached to said box cars is not guilty of con-

tributory negligence as a matter of law and, hence, the cases are distinguishable but the *McCoy* case is pointed out to show that the Court, in that case, recognized a 14-year-old boy to be a child of tender years who had not been classed as an adult. In so far as the child's capacity to realize the existence of a risk, the individual qualities of the child are taken into account. It is said in *Sec. 283E of the Re-statement of the Law of Torts*, as follows:

> "A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult, but his conduct is to be judged by the standard of behavior to be expected from a child of like age, intelligence and experience. A child may be so young as to be manifestly incapable of exercising any of these qualities of attention, intelligence and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a child who has not yet attained his majority may be as capable as an adult of exercising the qualities necessary to the perception of a risk and the realization of its unreasonable character.
>
> "Between these two extremes there are children whose capacities are infinitely various. The standard of conduct required of such a child is that which it is reasonable to expect of children of like age, intelligence and experience. *In so far as concerns the child's capacity to realize the existence of a risk, the individual qualities of the child are taken into account. If the child is of sufficient age, intelligence and experience to realize the harmful potentialities of a given situation*, he is required to exercise such prudence in caring for himself and such consideration for the safety of others as is common to children of like age, intelligence and experience. The fact that a child is

habitually reckless of the safety of himself and others to a degree unusual in similar children, does not excuse him.

"'It is impossible to fix the definite age at which children are capable of negligence or to fix the age at which a child, or any class of children, is able to appreciate and cope with the dangers of any particular situation. * * *.'

"The foregoing rules of law were applied by the Supreme Court in the case of Dallas Ry. & Terminal Co. v. Rogers, 147 Tex. 617, 218 S. W. 2d 456, when the court there held that a child of tender years is not bound to exercise for its own safety the care required of an adult, but the standard by which to measure the child's conduct is that degree of care ordinarily exercised by children of the same age, intelligence, experience and capacity under the same or similiar circumstances. Many authorities are there cited in support of the stated rule of law.

In the case of Northern Texas Traction Co. v. Thetford, 44 S. W. 2d 902, 904, the Commission of Appeals held with the approval of the Supreme Court that: 'In determining whether negligence is chargeable against a child who has passed beyond the age of irresponsibility, an inquiry as to the *extent of his capacity to appreciate the dangers of the situation is of prime importance*. The law requires that he exercise such degree of care as a person of his capacity would ordinarily exercise, under like circumstances. The matter of age, though germane to the question of capacity, is not necessarily of controlling force'."

The answer of the jury to Special Issue No. 68 expressly acquits Norman Brown of any charge of contributory negligence and, hence, he is entitled to judgment. This is well demonstrated by the decision of the Commission of Appeals

f Texas adopted by the Supreme Court in *Northern Texas Traction Co. v. Thetford, et al., 44 S. W. 2d 902*, which reads (Pg. 903-904):

"(1, 2) That Fred, notwithstanding his immature age, was fully capable of appreciating the dangers incident to his riding on the running board finds strong support in the evidence. The trial court, over the objection of the plaintiff in error, instructed the jury as follows: 'Negligence is the failure to use ordinary care and negligence of a child is to be measured by the standard of care which an ordinarily prudent child of similar age would exercise. Ordinary care is that care which a person of ordinary prudence would exercise under the same or similar circumstances, and, as to a child, is such care which a child of ordinary prudence of that age would exercise.' This charge is erroneous. In the respect that it deals with negligence on the part of a child, the charge bears directly on the special issue submitted to the jury which called for a finding as to whether or not Fred was guilty of negligence in riding on the running board of the automobile. The effect of the charge was to exclude from consideration the question, raised by the evidence, of Fred's capacity to appreciate the dangers of said situation, for the standard of care set up in the charge in such degree of care as a child of ordinary prudence, of Fred's age, would have exercised under the circumstances. Plainly this is not the law. In determining whether negligence is chargeable against a child who has passed beyond the age of irresponsibility, an inquiry as to the extent of his capacity to appreciate the dangers of the situation is of prime importance. The law requires that he exercise such degree of care as a person of his capacity would ordinarily exercise, under like circumstances. The matter of age, though germane to the question of capacity, is not necessarily of controlling force. These principles find support in

the following decisions: Missouri, K. & T. Ry. Co. v. Rodgers, 89 Tex. 675, 36 S. W. 243; Texas & P. Ry. Co. v. Phillips, 91 Tex. 278, 42 S. W. 852; Texas & P. Ry. Co. v. Crump, 102 Tex. 250, 115 S. W. 26; Cook v. Navigation Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52."

It would unduly prolong this petition to discuss the findings and the evidence raising the issues of discovered peril. However, in the event the petition of certiorari is granted, we will ask leave of this Honorable Court to file a supplemental brief.

CONCLUSION

This Petition is already necessarily voluminous for a discussion of Texas authorities demonstrating conclusively the error of the Amarillo Court in holding by way of surplusage that Brown was a trespasser and guilty of violation of the Penal Code of Texas with reference to the unlawful boarding of a train. Please see Application for Writ of Error on file with this cause under Point No. 8.

It is respectfully submitted that the due process clause of the Constitution of the United States has been violated and denied to Petitioner as complained of in each of the six questions raised. This HonorableCourt in the recent case of *Raphael Konigsberg, Petitioner v. State Bar of California, Volume 1, L. Ed. 2d No. 12, Page 18, U. S. S. C. R.*, laid down the rule that this Honorable Court in reviewing a state court decision, which is challenged as violating federal constitutional rights, is justified in searching the record to determine whether the crucial findings

have reasonable basis in the evidence. We respectfully submit that the six violations herein complained of constitute questions of such importance to the jurisprudence of this nation, since they involve a denial of due process, that this Honorable Court should review the record, and the opinion of the Amarillo Court of Civil Appeals, and finally reverse that judgment, render judgment for Petitioner in the sum of $150,000.00, together with interest from date of judgment, and all costs in this behalf expended, and in the alternative that this cause should be reversed and remanded to the District Court of Lubbock County, Texas, for a new hearing on the merits thereof before a properly established tribunal.

Respectfully submitted,

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I certify that a copy of the foregoing petition for writ of certiorari has been mailed the 10th day of June, 1957, to the respondent's attorneys, as follows: Messrs. McWhorter, Cobb & Johnson, 820 Lubbock National Building, Lubbock, Texas, and to Lewis Jeffrey, Santa Fe Building, Amarillo, Texas.

Searcy L. Johnson

SEARCY L. JOHNSON.

APPENDIX A

No. 6619

LESLIE E. BROWN, Individually and as Next Friend of Norman Brown, Minor

v.

PANHANDLE & SANTA FE RAILWAY COMPANY

September 24, 1956

This is an appeal from the trial of a damage suit in which judgment was rendered for the defendant upon a jury verdict. Appellant, Leslie E. Brown, filed suit individually and as next friend of his minor son, Norman Brown, against appellee, Panhandle & Santa Fe Railway Company, seeking damages in the total sum of $421,000.00 as a result of alleged injuries received by Norman Brown on April 14, 1952, in the Santa Fe Railway yards at Slaton, Texas, by reason of a moving freight train. As a result of jury findings convicting Norman Brown of contributory negligence on the occasion in question and probably for other reasons, the trial court rendered a "take nothing" judgment against appellants and for appellee from which judgment an appeal has been perfected.

The record reveals that Norman Brown was born on June 15, 1937, and that at the time of the alleged accident he was a little less than 14 years and 10 months of age,

was healthy and weighed 183 pounds; that he was strong, of the athletic type and enjoyed engaging in all athletic sports at school; that he was in the 8th grade at school, had a mechanical mind and kept and read mechanical books at his home; that he was the leader of the group of boys with whom he was associated and particularly those companions with him on the occasion in question and that he did most of the talking for the group; that at the time of his injuries his residence was with his parents in Wilmington, Los Angeles County, California; that a couple of days prior to receiving his injuries, he and two other neighboring boys approximately his age, namely Ronald Kalvin and Allen Wearing, left Wilmington, California, travelling in an automobile belonging to Mr. and Mrs. Leslie E. Brown, Norman Brown's parents, without the knowledge or consent of his parents, en route to the State of Arkansas to visit Norman Brown's grandfather; that while travelling fast at night time. r San Diego, California, with Norman Brown dri· :heir automobile hit a traffic island and rolled ove. al times, thus completely demolishing their automobile but not injuring any of the boys; that Norman Brown did not call his parents and advise them of his wreck but left the demolished automobile of his parents' where it was wrecked and proceeded on his way; that the three boys hitch-hiked thereafter to Midland, Texas, where a colored boy, Herman King, while driving an automobile, picked up the three boys and drove them to his home town of Slaton, Texas, where the three boys went to appellee's railroad yards for the purpose of catching a freight train

travelling east toward Dallas, Texas, and while there Norman Brown received his injuries while crawling under a freight train which began moving and threw him underneath its wheels as a result of which he had a leg and an arm cut off. On the occasion in question, the weather was fair and the vision of the said boys was clear as they entered appellee's switch yard where there were many railroad tracks covered by numerous freight cars and switching operations were going on in and out of the roundhouse and about the yards as the three boys, before the accident occurred, sought to find a train to ride.

The parties joined issues upon allegations of negligence of appellee's employees and of Norman Brown at the time and place of the alleged accident and appellants sought to invoke the law of discovered peril but the jury found against appellants on all answered issues seeking to apply the law of discovered peril by finding in effect that none of appellee's employees or agents discovered Norman Brown in a perilous position at any time and particularly immediately prior to the alleged injuries received. The jury exonerated appellee's employees of several charges of negligence but convicted employee C. T. Washington of several acts of negligence in that he, by the exercise of ordinary care, should have known that Norman Brown was about to enter appellee's switch yards and failed to warn him of the dangers of being in the switching yards on the occasion in question, which failure was a proximate cause of Norman Brown's injuries. The jury likewise convicted Norman Brown of three separate negative acts of negligence, each

of which was further found to be a proximate cause of his injuries and damages claimed, namely that at the time and place in question Norman Brown failed to exercise that degree of care which would have been exercised by boys of his age, experience and intelligence under the same or similar circumstances when he crawled under appellee's train in question; that he failed to use the care for his own safety such as would have been used by boys of his age, experience and intelligence under the circumstances as they existed at the time of and just prior to the occasion of the accident; and that he failed to keep a proper lookout for switching movements in and upon appellee's tracks in the switching yards just before and at the time he crawled under appellee's freight train. The jury further found that Norman Brown was not advised by any of appellee's switchmen that he could catch a ride upon any of appellee's freight trains running out of the switching yards; that he was not an invitee or trespasser upon appellee's premises but that he was a licensee and was not upon appellee's premises for the purpose of stealing a ride upon one of appellee's trains. The terms "licensee," "invitee," "trespasser" and "stealing a ride" were defined by the trial court. The jury found that it was not an unavoidable accident.

Appellants contend that the evidence was insufficient to support the jury findings convicting Norman Brown of the three separate negative acts of contributory negligence and they raised some question about the form of submission of these issues. When we apply the rules of law governing the

question of sufficiency of the evidence, there is an abundance of evidence to support the jury findings convicting Norman Brown of contributory negligence. We find no fault with the form of submission of these issues by the trial court and appellants are in no position to complain about such form of submission in any event because of their failure to object to or complain about the submission of them or the form thereof to the trial court before they were submitted.

In any event, we believe the trial court met the requirements of the law when it used the accepted standard for inquiring about the conduct of a child the age of Norman Brown, who, according to the evidence, was a normal child if not above the average, by inquiring if he "failed to exercise that degree of care which would have been exercised by boys of his age, experience and intelligence under the same or similar circumstances" when he crawled under appellee's train in question and received as a result thereof his injuries. When the jury found upon competent evidence that he did so fail and that such failure was a proximate cause of his injuries and damages, appellants and this Court are bound thereby, and we are also bound by the other jury findings of Norman Brown's contributory negligence. We believe such a standard of submission, or one substantially the same, was approved by the Supreme Court in the recent case of Dallas Ry. and Terminal Co. v. Rogers, 147 Tex. 617, 218 S. W. 2d 456.

Appellants also seek to find some sort of relief from the jury's findings on the question of discovered peril but we

have failed to find any grounds for any comfort to appellants as a result of the jury's answers given to the discovered peril issues because they were all answered against appellants to the effect that none of appellee's employees saw Norman Brown in a position of peril and the evidence supports such findings.

Appellants also seek to find comfort by reason of the jury findings to the effect that Norman Brown was not aware of the danger and risk he was taking in crawling under the train in question on the occasion of his injuries received. But the jury had already found repeatedly in effect that Norman Brown failed to exercise that degree of care a boy of his age should have exercised and that such failure was a proximate cause of his injuries and damages. It is not a question of whether or not Norman Brown was aware of the existing danger and risk but it is a question of whether or not he could and should have been aware of the danger and risk he assumed in crawling under a train in the switching yards covered by many tracks with numerous railroad cars standing thereon and switching operations in process all before his plain vision while he and his companions selected the route they took through the switching yards and the means they planned to use to board the train they expected to ride out toward Dallas, Texas.

In the case of Luck v. Buffalo Lakes, 144 S. W. 2d 672, plaintiff's son, a 17 year old boy, drowned in defendant's lake. In connection with the contributory negligence issues, the jury there found that the deceased did not knowingly go into the water to such a depth that he was in danger of

drowning nor knowingly wade out into the water too deep for one not able to swim; that he did not wade out to where he knew he would lose his footing and that he did not go to a dangerous depth knowing the danger thereof, but the jury likewise found that the deceased was guilty of entering water to the depth he did when he could not swim and that such negligence contributed to his death. Although the boy in that case did not knowingly expose himself to danger, he negligently did so, for which reason no damages were awarded to his survivors and this Court affirmed the trial court's judgment. So it is in the case at bar. Although the jury found that Norman Brown was not aware of the danger and risk, it further found that he should have been aware of such under the circumstances with a switching yard full of visible train cars and switching operations going on about him and his companions. There is no pleading or proof that Norman Brown was not a normal boy or that he was afflicted with mental incapacity, in which event it must be presumed that he was a normal boy, and we believe the evidence reveals that he was above the average for his age in mentality and leadership.

Appellants also claim there is a conflict in the jury's answers concerning Norman Brown's contributory negligence and his failure to be aware of the existing danger and risk. We do not find any conflict in such answers of the jury. We cite again the case of Luck v. Buffalo Lakes, supra, Sec: 6, in support of our holding.

It seems that appellants contend that Norman Brown was granted some sort of permission to ride appellee's

freight train bound for Dallas. They do not challenge the jury's answers to Special Issue No. 19, wherein the jury found in effect that Norman Brown was not advised by any of appellee's switchmen that he could catch a ride upon appellee's freight train, which finding is supported by competent evidence. Neither do appellants complain about the jury finding in answer to Special Issue No. 1, wherein it found that the act of appellee's employee, C. T. Washington, in advising Norman Brown the time that a freight train would be leaving for Dallas upon a certain track did not constitute negligence. Washington testified that he thought Norman Brown was the son or a relative of one of appellee's employees who would be leaving on the said train and for some reason wanted to see such employee before he left. He further testified that he did not give Norman Brown or any one else permission to ride that or any other train out of appellee's yards, which testimony supports the jury finding in answer to Special Issue No. 19. Appellants and this Court are bound by such findings.

Appellants charge error because of a communication between the trial judge and one juror after the trial began and a part of the evidence had been heard and before the case had been given to the jury for its deliberation. As a result of such a communication, appellants complain because the trial court failed to declare a mistrial. The record reveals that after the trial had proceeded as previously stated and recessed overnight and before court convened the next morning, Juror F. L. Price approached the trial judge in the hall at the courthouse and told the

judge that he had discovered after voir dire examination of the jury and the trial had begun that he was acquainted with one of the appellants' witnesses, namely, E. L. Stewart; that on voir dire examination he was not asked whether or not he knew any of the witnesses by giving the names of such witnesses; that if he had been asked if he knew the witness, E. L. Stewart, he would have answered in the affirmative but he did not know until later that Stewart was to be a witness in the case and the juror further stated that the fact that Stewart was a witness would not have any effect on him one way or the other anyway. The trial judge reported the juror's statement to counsel for both parties and a lengthy conference was held between the lawyers in the case and the trial court in the absence of the jury, as reported in the statement of facts which is before us. It reflects that appellee's counsel moved for a mistrial because of the juror's statement made to the trial judge. Appellants' counsel protested and said, "I can't ask for a mistrial because the case has been pending a long time, the witnesses are alive today and are here and the jury can see them; they live in California, they're poor people and they can't undergo the expense of a delay * * *." A suggestion was there made to the effect that juror, F. L. Price, be excused and to try the remainder of the case by agreement before the other 11 jurors, but such agreement was not reached. Appellants' counsel suggested the probability of excusing the juror, F. L. Price, and selecting in lieu thereof, after a part of the evidence had been heard, a 12th juror to take his place, but that was not done. The juror, Price, continued to serve and nothing further was

said to him about the matter in so far as the record reflects. Before further procedure was had, however, the witness, E. L. Stewart, was called and examined in the absence of the jury about his acquaintance with the juror, Price, and testified that he had known the juror, Price, when they "were school kids together" about 1925, but he had not had any personal visit with Price in about four years; that he saw Price in the courthouse the previous day and spoke to him that afternoon as he started home and Price asked him where he had been. No showing was made of anything other than personal remarks passing between them. Stewart later testified that he was a helper on a switch engine at the Slaton railroad yard at the time in question and he gave testimony principally concerning the switching operations in the yard on the afternoon of Norman Brown's injuries.

It is doubtful if appellants should now be heard to complain because the trial court failed to declare a mistrial as a result of the communication of the juror, Price, with the trial court as previously shown after appellants, through their counsel, protested and opposed the granting of a mistrial by the trial court when the matters complained about occurred as reflected by the record previously herein shown. But, be that as it may, in our opinion the Supreme Court of Texas, in the recent case of Ross v. Texas Employers' Ins. Assn., 153 Tex. 276, 267 S. W. 2d 541, has relaxed the old rules of procedure concerning an oral communication between one juror and the trial judge after the case has proceeded to trial. In a similar situation there presented, the Supreme Court held that such an oral com-

munication did not require a reversal of the trial court's judgment unless prejudicial injury has been shown by appellant to exist, and there cites the provisions of Rules 434 and 503, T. R. C. P., in support thereof. In our opinion appellants have failed to show any prejudicial injury committed in any event as a result of the charges made by them.

While the jury found that Norman Brown was not a trespasser and that he was not on appellee's premises for the purpose of stealing a ride on appellee's train, under the record presented and according to the provisions of Art. 1673, Penal Code, concerning the unlawful boarding of a train, we believe it has been conclusively shown that Norman Brown was on the premises for the purpose of stealing a ride on one of appellee's trains notwithstanding the jury's answer to the contrary. According to the record before us we believe that it has been conclusively established that Norman Brown was a trespasser on appellee's premises by the terms of the definition of the trial court, notwithstanding the jury's answer to the contrary. But because of our disposition of the other material matters which require an affirmance of the case, these questions will not be here further discussed.

As a result of a careful examination of the record and the briefs, we find no reversible error if in fact any error. Appellants' points to the contrary are all overruled and the judgment of the trial court is affirmed.

PITTS, C. J.

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JOHN T. FEY, Clerk

No. [redacted] 185

In the

Supreme Court of the United States

OCTOBER TERM, 1956

LESLIE E. BROWN, Individually, and as Next Friend for NORMAN BROWN, a Minor,

Petitioner,

v.

PANHANDLE AND SANTA FE RAILWAY COMPANY,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO AUTHORITIES

	Page
Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 41 Law Ed. 979	19
East Texas Theatres v. Swink, 173 S. W. 2d 224	9
Eaton v. R. B. George Investments, 260 S. W. 2d 587	16
Ford v. Panhandle & Santa Fe, 252 S. W. 2d 561	5, 9
Hoff v. Natural Refining Products Co., 118 A. 2d 714	12
Mann v. Kentucky & Indiana Terminal Railroad Co., 290 S. W. 2d 820	13
Stern v. Bensieck, 61 S. W. 594 (Missouri Case)	17
13 N. A. C. C. A. Law Journal, 224-228	15
14 N. A. C. C. A. Law Journal, 226, 228-231	15
65 C. J. S., page 148	10, 12

No. 1080

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To the Honorable, the Supreme Court of the United States:

The Brief of the Respondent is so devoid of merit that we do not feel that we should attempt to answer same in any great detail except to say that the number of judges that passed upon the case is of no controlling importance where those judges have acted arbitrarily, capriciously and in such a manner as to deny to petitioner due process as same has been discussed and defined by the decisions of this Honorable Court cited in our original petition.

We would here like to discuss, since we were unable to do so in our original petition, our theory that the findings of the jury raised the issue of discovered peril. It has long been the settled law that it is not necessary to submit undisputed issues of fact to the jury. This is particularly true where one of the defendants' witnesses makes admissions against the defendant that are admissible as admissions. On page 494 of the record, C. T. Washington made the following admissions:

> "Q. I want to know, are you right, now, when you say that you did tell them it was going to leave on Track No. 6?
>
> "A. Well, they asked me if there was a train going to Sweetwater and what track it was on and I told them, 'Track No. 6.'
>
> "Q. And you know that your duty was not to tell them that and on the other hand your duty was to warn them of their danger, wasn't it?
>
> "A. Well, sir, yes, sir, in a way it was danger to warn them of their—in a way to warn them of their danger, yes, sir."

The fact that C. T. Washington knew that it was a hidden danger and that the boys did not recognize it is shown in the following testimony, without dispute:

> "Q. All right. Now, the way you think that accident happened is that it came in there and due to that very peculiar—I believe you said that due to that way that thing came in there on the lead track and the way it had to get back over there, in your deposition, that the boys might have had a minute and a half to see if they could have seen it at all, isn't that right?
>
> "A. Yes, sir.

"Q. And then you said you don't know, you doubt very much, since the diesel engine doesn't put out very much smoke, you doubt if they could see any smoke at all from down there at the depot, didn't you?

"A. Yes, sir, unless the engine would have been working.

"Q. And the way you think that thing really happened is that they looked up there and couldn't see it and then it came in there on that short track and hooked on and backed up before they knew about it, isn't that right?

"A. Well, I didn't say that was the way it happened, no, sir."

The above testimony, coming from the switching foreman who had charge and control of the defendant's train, C. T. Washington, on the occasion in question, rendered unnecessary any submission of any issue as to whether or not C. T. Washington discovered the dangerous and perilous position of Norman Brown prior to the accident in question. The theory of discovered peril which the plaintiff specifically plead was as follows:

"(g) Plaintiff alleges that the defendant's switchmen actually discovered the dangerous and perilous position of the said Norman Brown prior to the accident in question in that the defendant's switchmen knew that in order to get to Track No. 7 that it would be necessary for the said Norman Brown to cross over or under or between box cars which were located on Track No. 3, or at least knew that said cars constituted a hidden danger to the said Norman Brown and in this connection plaintiff alleges that the defendant's switchmen knew that the cars on Track No. 3, or some of them, were about to be moved, and that the said defendant's switchmen then and there knew that the

said Norman Brown might not or probably would not extricate himself from such dangerous position, and plaintiff alleges that after the said switchmen knew that the said Norman Brown was in a dangerous and perilous position by virtue of proceeding toward said hidden and latent danger, that the said defendant's switchmen then and there failed to warn the said Norman Brown, and then and there failed to use ordinary care and use the means then and there at his command to have avoided said accident, and plaintiff alleges that the failure of the defendant switchmen to exercise ordinary and reasonable care and to use such means then and there at their command, which said means could have been used with reasonable safety to the defendant switchmen and the defendant's property, constitutes negligence upon the part of the defendant herein, which said negligence was a proximate cause of plaintiff's damages and injuries, and renders the defendant liable to respond to the plaintiff herein for all the injuries and damages sustained by the said Norman Brown."

The findings of the jury, in answer to Special Issue No. 30, was as follows:

"Do you find from a preponderance of the evidence that the defendant switchman, C. T. Washington, should have warned Norman Brown that there was not only a train upon Track No. 6 or 7, or upon a track preparing to go to Dallas, but that there was also a long string of box cars standing still upon Track No. 3 and that switching operations were being carried on, which might result in cars that were apparently standing still being suddenly moved?

"Answer 'yes' or 'no.'

"Answer: Yes."

In answer to Special Issue No. 31, the jury found that this failure to give such warning constituted negligence.

and in answer to Special Issue No. 32, that such negligence was a proximate cause of plaintiff's injuries and damages. Bearing in mind the rule announced by the Supreme Court of Texas in *Ford v. Carpenter*, fully discussed in our original petition for certiorari, it is the duty of this Honorable Court to make the construction called for by the pleadings and the evidence in this case. No other construction can be given in that this finding of the jury not only amounted to a finding that Washington knew of the danger of the boys, *but this was a finding that the switchman, Washington, knew that the boys were going to cut across, between or crawl under these cars standing on Track No. 3, and further, that the boys would probably be unable to see the train, and at the time they were crawling under said cars that were apparently standing still, that the box cars might be suddenly moved, and that Washington had knowledge of all of these facts.*

The opinion of the Supreme Court of Texas in *Ford v. Panhandle & Santa Fe, 252 S. W. 2d 561*, is squarely in point here. We quote from various portions of that opinion as follows:

> "In an opinion by Chief Justice Gaines in the Finn case, the Supreme Court undoubtedly adopted the rule laid down in the Munn case by saying: 'The case was submitted to the jury solely upon the ground of discovered peril, and, the jury having found that the servants of the company discovered that the plaintiff was in a perilous position, *or about to enter such position*, in time to have avoided the injury by the means at their command, we cannot reverse the judgment if there be any evidence to justify the verdict.'

"In the Gehring case (134 S. W. 291) the Court condemned a charge that did not impose a duty of care toward one near railroad tracks unless it appeared that he 'would certainly be injured unless the operatives of the car could prevent it.' The Court asked: '*When * * * the proximity of deceased to the track was such as to excite in his (the motorman's) mind an apprehension that the deceased would surely be struck if he continued walking as he was*, and when it was apparent that he did not hear the ringing of the gong, could the motorman delay action until such time as he realized that the deceased would certainly be injured unless he prevented it?' The Court answered: 'We think not. * * * *It is the knowledge by the operatives of the danger of injury and not the certainty of injury, that calls forth the action.*'

"In the first Higginbotham case (155 S. W. 1027) the plaintiff was hit by a train while he was apparently absorbed in trying to get his horses off a railroad track. With reference to the duty owed to the plaintiff by the train operatives, the Court said: 'It was not necessary, in order to charge them with the duty of using the means at their command to prevent injury to the deceased, that they should have believed or thought it certain that deceased would not get out of the way of the train. * * * If the circumstances reasonably indicated to said operatives the probability of his not getting off the track, they were not authorized to speculate on whether he would or would not get off, and take the risk of killing him when it was in their power to prevent injuring him. *If the doctrine of discovered peril only applied when the operatives of a train were certain that the person injured was in peril of life and took no steps to save him when his injury could have been prevented, the necessary proof in every case in which discovered peril is a ground of recovery would show a case of murder or criminal negligence. Such proof is not necessary.*'

"In the case of Hines v. Arrant (225 S. W. 779) the defendant railroad requested a special charge on discovered peril which would have exculpated it of liability unless 'the engineer actually knew that plaintiff would attempt to cross the track in front of the train.' The Court of Civil Appeals said: 'The charge requires the jury to find too much in order to reach the conclusion that the engineer should use the facilities at his hand to stop the train. He could not in the very nature of things actually know what was in the mind of the appellee as the latter was driving toward the crossing. It was his duty, if he discovered the appellee approaching the crossing and *could reasonably infer that he would likely undertake to cross the track, to use the facilities at hand to prevent a collision*, either by stopping or by lessening the speed of his train, or by giving some warning of the train's approach. *He had no right to wait until he was absolutely certain that the traveler was going into a place of danger before taking the proper steps to avoid injuring him.*'

"In the Wagner case (298 S. W. 533) a case in which a pedestrain was killed while running across a track in front of a train, the court, speaking through Commissioner, P. J. Harvey said: '*In order for a person to be in peril, it is not necessary that bodily injury will certainly be suffered by him. He is in peril whenever he is pursuing a course which probably will terminate in serious bodily injury to him. Whenever it reasonably appears to a second person is held to have knowledge of the peril of the other.*'

"A few other cases illustrating from an application of the law to the facts that certainty of injury and knowledge thereof was not made the basis for applying the doctrine of discovered peril, are Verble v. Schaff, Tex. Com. App., 251 S. W. 1023; Houston E. W. T. Ry. Co. v. Kopinitsch, 114 Tex. 367, 268 S. W. 923; Houston E. & W. T. Ry. Co. v. Sherman, Tex. Com. App., 12 S. W. 2d 241; Texas & N. O. R.

Co. v. Krasoff, 144 Tex. 436, 191 S. W. 2d 1, Sisti v. Thompson, 149 Tex. 189, 229 S. W. 2d 610. Other such cases might be added ad infinitum.

"The language quoted from the Napier and the Parks cases should be disapproved only after the most careful re-examination. A reading of the opinions will leave no doubt but that both cases were correctly decided.

"Commissioner German in his opinion in the Napier case cites no authority for his statement that one approaching a railroad track is never in a position of peril until he reaches a point where he cannot stop short of the track. The only case cited as supporting the language quoted from the Parks case is the case of Texas & P. Ry. Co. v. Brown, 142 Tex. 385, 181 S. W. 2d 68. The first case cited in the Brown case in support of the holding there made is the Shetter case, which, on the point under discussion, had long since been repudiated as a precedent.

"To give our sanction to the rule advocated by respondent would be virtually to destroy the doctrine of discovered peril. It would mean that a duty to act never arises until there is certainty of injury, although there is every reason to believe that injury probably will occur. It would also mean that no duty to act arises unless the person in peril is unable to extricate himself therefrom although there is full realization that he is unlikely to do so. Such is not the basis of the humanitarian doctrine of discovered peril.

"If no vehicle were in a position of peril until it reached a point where it was impossible to stop it short of collision, the time for acting would rarely be sufficient to impose a duty to act. *If a pedestrian were never in a position of peril until he took the last step placing himself in front of a moving train or vehicle, then he could never recover under the doctrine of discovered peril because until he took the last and final step it lay in his power not to take it.*"

Under the above case, *these boys were in a position of peril when the evidence is construed most favorably from the time they left, walking down the cars alongside Track 3 in full view of Washington and with Washington's knowledge that they were going to cut across at the depot to Track No. 6, and with Washington's knowledge at that very time that this long string of box cars might be suddenly moved and would be moved suddenly at a time when the boys could not see or hear the engine, and such knowledge upon Washington's part, under his own undisputed admissions, plus the findings of the jury, entitled petitioners to recover upon the doctrine of discovered peril* as same has been so ably discussed by Mr. Justice Calvert in *Ford v. Panhandle & Santa Fe Railway Company.*

A group of issues similar to the issues here presented was held to raise the issue of discovered peril in a situation similar to the case at bar in *East Texas Theatres v. Swink*, *173 S. W. 2d 224*. This case was reversed by the Supreme Court of Texas, in *177 S. W. 2d 195*, but it was not reversed because of a failure of the findings to raise the issue to find discovered peril, but because the evidence in the case shows that there was not time after the discovery of the peril in the *Swink* case to have done anything about it. The issue of time here was some thirty minutes, and the matter of time in this case appears in this record without dispute to have been sufficient. Of course, contributory negligence is not a defense in the event this honorable Court should hold with petitioner on discovered peril. We further respectfully submit that the evidence was insufficient to support the find-

ings of the jury as to any contributory negligence on the part of the boys, and we are further of the opinion and respectfully submit to the court that respondent having failed to obtain a finding as to what an *ordinarily prudent boy* would have done, *failed to obtain a finding of negligence as a matter of law upon the part of petitioner.* We further contend that Special Issue No. 68 acquits Norman Brown of any charge of contributory negligence. The Amarillo Court had no right to discuss how intelligent Norman Brown was, since it has no place in this law suit. *A motion for Judgment Non Obstante Veredicto is necessary to support a claim that a jury finding is without support in the evidence under settled Texas law.* Without further ado we submit the following from *45 C. J. S., page 715:*

> "Knowledge and appreciation of the danger or risk of injury, actual or imputed, are essential in order that a child may be guilty or contributory negligence.
>
> "Knowledge and appreciation of the danger or risk of injury, actual or imputed, are essential in order that a child may be guilty of contributory negligence. Mere knowledge that injury might result, without appreciation of the risk of injury to which its conduct exposed it, is not sufficient. It is not necessary, however, that it actually know and appreciate the danger; it is sufficient if it was so obvious that an ordinarily prudent child of the same capacity for knowing and appreciating the danger or risk would have known and appreciated it under the same or similar circumstances. However, unless the danger was of such a character, knowledge and appreciation thereof will not be imputed to a child who was not actually aware of it.
>
> "Momentary forgetfulness. Momentary forgetfulness of, or inattention to, a known danger will not al-

ways constitute negligence, but the circumstances of the particular case must be considered.

"§149—Particular Acts and Omissions

"A child, who exposes itself to a danger or risk of injury which it knows and appreciates, or should know and appreciate, or which it has been warned to avoid, may be guilty of contributory negligence, but the conduct of a child in an emergency which under other circumstances would be negligence may not amount to contributory negligence. The mere fact that a child is a trespasser is not conclusive of contributory negligence.

"Except where the child is so young as to be incapable of exercising any care for its own safety, as discussed supra §145, a child who knows and appreciates, or should know and appreciate, the danger or risk from which its injury might reasonably be anticipated, must exercise reasonable care to avoid such danger, and one who by its conduct exposes itself thereto may be guilty of contributory negligence, even though the resulting injury is greater than it anticipates. However, the mere fact that the child knew and appreciated or should have known and appreciated, the danger, does not necessarily show negligence on its part. It is not negligent, if, under the same or similar circumstances, *AN ORDINARILY PRUDENT CHILD* of the same capacity for avoiding danger would have acted as it did or where its failure to exercise such care did not contribute as a proximate cause to its injury.

"Disregard of warnings. A child who exposes itself to a danger or risk of injury which it has been warned to avoid may be guilty of contributory negligence, even though it does not realize the full extent or degree of the risk which its conduct involves. Knowledge and appreciation of the danger will not be imputed to the child, however, where the warning re-

lated to a cause entirely different from that which resulted in the injury. Likewise, a child will not be deemed guilty of contributory negligence, notwithstanding it has been warned of the danger, if, under the same or similar circumstances AN ORDINARILY PRUDENT CHILD of the same capacity for appreciating and avoiding danger or risk of injury would have exposed itself to the danger."

A New Jersey Court has recently examined the age problem under the "Attractive nuisance" doctrine within the framework of Sec. 339 of the Restatement of Torts. In *Hoff v. Natural Refining Products Co.*, 118A 2d 714, a 13-year 8 months old boy was harmed when a part of defendant's chemical mound, some 50 feet high, caved in, causing the boy to fall, resulting in a broken leg and other injuries. The chemical pile was located in an urban, mixed industrial and residential area bordered by city streets. Plaintiff and other boys had frequently for years past climbed and played on the pile, but the boys had never been warned away, nor was there any fence or other barrier to free access. The injured boy was an "average" student in elementary school, in the 8th grade at the time of the accident, and his grades had been "good" before the accident. The trial Judge granted defendant's motion to dismiss on the ground that since plaintiff was not a child of such tender years as to be unable to recognize the danger and appreciate the risks in playing on the refuse pile, defendant had not breached any duty to this boy. The Court ruled he was of sufficient age to size up and avoid the danger. Plaintiff appealed. Held, reversed and remanded for a new trial. Whether the 13-

year 8-month old plaintiff was old enough to appreciate and avoid the danger was a question of fact for the jury.

The latest edition of the *N. A. C. C. A. Law Journal* in reviewing this case says:

> "With broad and fastidious scholarship, Judge Conford considered a large number of out of State decisions bearing on the age problem and persuasively concluded that no hard and fast rule as to age and attendant applicability of Sec. 339 should be drawn. The age of the child will affect both the chance and size of resulting harm.
>
> "While dangers normally dimish with increasing age of the child, a foreseeable risk of serious harm to trespassing children, not of tender years, may still exist where dangers are latent. The age factor should therefore not be administered inflexibly as a line or formula, not elastically as a zone. We are dealing here not with a line, but a zone, not black and white but a shifting po-numbra of gray that properly falls within the rational range of the triers of fact."

A far-reaching decision of great importance is *Mann v. Kentucky & Indiana Terminal Railroad Co., 290 S. W. 2d 820.*

In that case the Court held:

(1) We are concerned with the matter of duty to the child before he strayed onto the tracks and with an infant completely incapable of discretion and wholly irresponsible for his own act.

(2) The doctrine of non-liability for injuries to trespassers is generally applicable to infants except (a) where liability may be imposed under the law of attractive nui-

sance, and (b) where one maintains on his premises something dangerous to children and so exposed that there is likelihood of their coming in contact with and being injured by it.

(3) It is under this last concept of legal duty, sometimes called an intermediate rule as between attractive nuisance and conventional liability to a trespasser, but regarded by this Court as an extension of the attractive nuisance doctrine, that the present case rests.

(4) Liability here rests upon reasonable anticipation that children might be exposed to danger, and the duty to take precaution against their going on the premises.

(5) The exception of the statutory obligation would seem to mean where such way passes over the tracks and does not terminate at the railroad; but even if it be regarded as without this qualification, the fact that fencing a switchyard under ordinary conditions is not required as a statutory duty does not absolve the railroad company from an act of diligence and care imposed by the common law under the circumstances of the particular case.

(6) The case should have been submitted by an instruction which regarded as a matter of law the switchyard as an inherent peril to a little child and left to the jury to decide issues (a) of actual or constructive knowledge of the presence of persons—especially children—in the yard sufficient to impose a duty of reasonable anticipation of the child at the time and place of the accident, and (b) whether the defendant failed to exercise ordinary care and diligence

to use such means and facilities or reasonable precaution as would reasonably protect and safeguard children of tender years from going upon the tracks, and that the plaintiff's injury was the proximate result thereof.

This holding is in keeping with Dean Roscoe Pound's statement in *13 N. A. C. C. A. Law Journal, 224-228*, where Dean Pound said, Pg. 228:

> "It is in keeping with the present trend of the law to restrict the owner's liberty of using his land and his right of prohibiting trespass by recognizing that in the crowded world of today, it must be expected that children will trespass and where such trespassers are reasonably to be foreseen, the landlord is liable for not warning or providing adequate guard or protection." See also James Inroads on *Old Tort Concepts, 14 N. A. C. C. A. Law Journal, 226, 228-231.*

The gross injustice committed in the "Mother Hubbard" opinion of the Amarillo Court is demonstrated by their attempt to claim that Brown was a trespasser and had violated the criminal statutes with reference to attempting to steal a ride on the train without securing permission of anyone in charge of the train to catch such ride. It must be remembered that it is elementary that Penal Statutes must be strictly construed to hold that these boys did not have permission to catch the train after Mr. Washington, who was in charge of the train gave them permission, *is so contrary to the law and is so far-fetched that such construction of a criminal statute does violence to the fundamental safeguards of the citizens of this country. It does prove that the Amarillo Court simply feels that because the boy*

had been given permission to get a free ride, that it would be inequitable to hold the defendant liable. We have conclusively demonstrated by our Petition and this Supplemental Answer that such is not the law of Texas. As a matter of fact, Mr. Justice Calvert, speaking for the Supreme Court in *Eaton v. R. B. George Investments, 260 S. W. 2d 587*, said the exact opposite on Pg. 590 of the opinion as follows:

> "The same rule in somewhat different language was recognized by the United States Court of Appeals for the Fifth Circuit in the case of Stanolind Oil & Gas Co. v. Franklin, 193 F. 2d 561, 563, when it said: 'The fact that a child may be a trespasser does not necessarily exonerate the owner of the premises accessible to children, and likely to be frequented by them, from the duty to take reasonable precautions for their safety. Under ordinary conditions, trespassing children occupy the same position of trespassing adults; and the tender age of a child, rendering it incapable of looking out for its own safety, does not raise a duty where none otherwise exists. To warrant a recovery for injury to a trespassing child, it must be shown that the injury was caused by the negligence of the owner or occupant *after the presence of the trespassing child upon the premises was known to him* or reasonably should have been foreseen by him.' A reading of the opinion of the court will reflect that a judgment for the plaintiff was affirmed, not on the theory that the defendant's shop wherein the child was injured was an attractive nuisance but on the theory that the defendant should have known that children would likely go into the shop to their injury unless it was kept locked.
>
> "'*The effect of these late cases is to abolish as to young children the distinction between trespassers, licensees and invitees when the four conditions have*

> *been satisfied and to impose on the landowner under such circumstances a duty of ordinary care to protect them from injury.* For interesting comments on the impact of the Banker decision, see case note by Vickery, 26 Tex. Law Rev. 821. Landowners' Responsibility to Children by Loen Gree, 27 Tex. Law Rev. 1, and Banker v. McLaughlin: Extension of Attractive Nuisance Doctrine in Texas by S. T. Morris, 11 Texas Bar Journal 481'."

In this case the State Courts have disregarded substantive law in such a manner as to constitute denial of due process in that they have not only refused judgment for $150,000.00 which was the sacred property right of the minor plaintiff, but they have done so on findings of contributory negligence that are so conflicting that they will not even discuss same. In addition to this, the law of the land has been disregarded in that they failed to submit any issues inquiring as to whether or not Norman Brown failed to exercise the care that *an ordinarily prudent boy* would have exercised. This is fatally erroneous since the burden was upon the defendant as to these issues of contributory negligence.

The omission of the term "ordinarily prudent" is reversibly erroneous under the case of *Stern v. Bensieck, 61 S. W. 594 (Missouri case).* In that case the Court said:

> "The son of the plaintiff was bound to exercise such reasonable care and caution for his personal safety while using the sidewalk as a boy of his age, experience and intelligence was individually capable of and as shown by the evidence.
>
> "It is insisted by plaintiff that the Court properly set aside the verdict for the giving of instruction No.

4, because it exacted the highest degree of care of which the boy was capable, whereas he was only required by the law of this state to exercise that ordinary care and prudence which under like circumstances, could reasonably be expected of a boy of his years, capacity and experience."

We think the Circuit Court erred in said instruction.

"The instruction exacted the highest degree of care of which the boy was capable. He was capable of exercising the highest degree of care that a boy of his age and intelligence could exercise. An adult is only required to exercise that ordinary care in traveling along the streets of a city that a reasonably prudent person would observe under similar circumstances, not the highest degree of which he is capable, and yet, this instruction exacts more of a boy of tender years than is required of an adult.

"In this case the plaintiff was required to exercise the highest degree of care of which he was capable and, hence, plaintiff's Motion for Judgment should be sustained in that there is no proper finding of contributory negligence. The cases cited in the Supreme Court opinion of *Dallas Railway and Terminal Company v. Rogers, 218 S. W. 2d 456*, are clearly in support of the view that this omission of what *an ordinarily prudent child* should have done, is fatally defective."

CONCLUSION

The Court will bear in mind that the only excuse that the juror had for failing to admit his close relationship with the defendant's chief witness and one whose negligence was involved or could have been involved in this case was that the question was asked him *generally* instead of

specifically. The opinion of Mr. Justice Harlan in *Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 41 Law Ed. 979*, on page 984 is clearly in point here wherein he said:

> "This court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U. S. 97, 102 (24: 616, 619). The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

And, again, we would like to quote from that great decision in *Fleenor v. Hammond, 116 Fed. 2d 982*, wherein the Court said, in speaking of due process:

> "While the phrase 'due process of law,' has never been precisely defined and perhaps is incapable of such definition, the concept is within limits capable of being fully grasped by the judicial and professional mind. It has frequently been construed as synonymous with the phrase 'according to the law of the land.' Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158, 84 A. L. R. 527, notes the general acceptance of Webster's classic commentary upon it as 'a law which hears before it condemns.' More recently it was said, Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 465, 80 L. Ed. 682, that the due process clause requires 'that state action, whether through one agency or another, *shall* be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

We respectfully submit that the Petition for Writ of Certiorari should be granted and that upon hearing, judgment should be rendered for petitioner in the sum of $150,000.00, together with interest from date of judgment at the rate of 6% per annum and, in the alternative, that this cause should be reversed and remanded to the District Court of Lubbock County, Texas, for a new trial on the merits thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petitioner's brief in reply to respondent's brief in opposition to petition for writ of certiorari has been mailed this day of October, 1957, to the respondent's attorneys, as follows: Messrs. McWhorter, Cobb & Johnson, 820 Lubbock National Building, Lubbock, Texas, and to Lewis Jeffrey, Santa Fe Building, Amarillo, Texas.

Searcy L. Johnson

SEARCY L. JOHNSON

Office - Supreme Court, U.S.
FILED
JUL 8 1957
JOHN T. FEY, Clerk

In The

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1080~~ 185

LESLIE E. BROWN, Individually, and as Next Friend for NORMAN BROWN, a Minor,

Petitioner,

v.

PANHANDLE AND SANTA FE RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Amarillo, Texas

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Respondent would show that Certiorari should be denied in this case because:

REASONS FOR DENYING THE WRIT

1. The Petition for Writ of Certiorari does not sufficiently comply with the Rules of this Court to entitle it to consideration. It is but a composite reprint of a mass of Motions for Rehearing formerly filed in and addressed to the Court of Civil Appeals and the Supreme Court of Texas.

2. The Petition for Writ of Certiorari is misleading, and does violent injustice to the Record in the following particulars, and others:

(a) At pages 4, 6, 25 and 34 of the Petition, it is said that a juror "not only concealed", but "denied" acquaintance with a witness on voir doir examination, but the quotation from the record, appearing on page 11 of the Petition, shows that the juror was not interrogated specifically on the point, and that the juror made voluntary disclosure of his acquaintance.

(b) On page 27 of the Petition it is said: " . . . the examination of the juror in the presence of Counsel was calculated to harm the plaintiff." But the juror was not called to testify, as is disclosed by the absence of his testimony in the record before this Court.

3. The Petition's attempted statement of Federal questions, even had such questions been raised below, is so devoid of merit and insubstantial as to be frivolous.

4. The Petition does not disclose that any claimed Federal or Constitutional question was raised by Petitioner in either the trial court, the Court of Civil Appeals, or the Supreme Court of Texas, and the vague, statements, contained in Briefs of *Amici* in support of Motion for Rehearing of Petition for Writ of Error in the Supreme Court of Texas, as referred to on pages 33-42 of the Petition, are wholly inadequate to raise Federal questions for Petitioner.

5. This is a simple, common law negligence case brought in the court of a State wherein the law of con-

tributory negligence is in effect. No Federal statute was or could have been invoked. Applying State procedural and substantive law, and giving effect to a jury verdict, the trial court gave judgment to Respondent-Defendant, and overruled motion for rehearing; the Court of Civil Appeals affirmed, and overruled motion for rehearing; the Supreme Court of Texas, finding no reversible error, refused Writ of Error, and thereafter overruled an elaborate Motion for Rehearing, supported by numerous *Amici* Briefs. That three Courts, composed of thirteen Judges, have six separate times heard Petitioner-Plaintiff's contentions, establishes that due process of law has not been denied, even had such question been raised and ruled below.

6. Examination of the proceedings in the three Courts below, contained in the Record, will affirmatively disclose that no Federal or Constitutional question was raised or decided in the Courts below, and the elaborate, carefully reasoned opinion of the Court of Civil Appeals (224 S.W. 2d, 223) affirmatively discloses that due process of law was accorded, even though such question was not raised or expressly ruled.

7. The Petition for Certiorari is without merit. It suggests no question of public importance warranting review by this Court. It merely illustrates a "case in which losing counsel is outraged by the decision against him".—*Stern and Gressman, "Supreme Court Practice"*, page 199. The case stands upon its own peculiar facts, namely Petitioner-Plaintiff, almost 15 years of age, accompanied by two companions took his parents' automobile without their knowledge or consent, and started from Wilmington, California

for Arkansas. Soon they wrecked the car, and thereafter hitch-hiked onward toward their destination as far as Slaton, Lubbock County, Texas, at which point, while crawling under one train in Respondent-Defendant's yards, in an attempt to steal a ride on another train, Petitioner was injured. The jury found him guilty of contributory negligence upon adequate evidence, upon which finding judgment was rendered that he take nothing, which judgment has been consistently affirmed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles L. Cobb, one of the attorneys for Respondent, Panhandle and Santa Fe Railway Company, do hereby certify that a copy of the foregoing brief in opposition to Petition for Writ of Certiorari has been served upon Petitioner by depositing copies thereof in the United States Post Office at Lubbock, Texas, first class, postage prepaid, addressed to counsel of record for Petitioner, John J. Watts, 403 North Texas, Odessa, Texas, Robert Lee Guthrie and Searcy L. Johnson, 1608 Mercantile Bank Building, Dallas 1, Texas, Samuelson and Buck, Attorneys at Law, Long Beach, California, Warren E. Miller, 1012 Barr Building, 910 17th Street, N.W., Washington, D. C. and Walter Ely, 800 Statler Center, 900 Wilshire Boulevard, Los Angeles 17, California, on this 3rd day of July, 1957.

Charles L. Cobb

CHARLES L. COBB

Counsel of Record for Respondent.